No. 17-654	
Title:	**Alex M. Azar, II, Secretary of Health and Human Services, et al., Petitioners** **v.** **Rochelle Garza, as Guardian ad Litem to Unaccompanied Minor J. D.**
Docketed:	November 3, 2017
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(17-5236)
Decision Date:	October 24, 2017

DATE	PROCEEDINGS AND ORDERS
Nov 03 2017	Petition for a writ of certiorari filed. (Response due December 4, 2017)
Nov 03 2017	Motion to lodge non-record material under seal filed by petitioners.
Nov 08 2017	Motion DISTRIBUTED for Conference of 12/1/2017.
Nov 17 2017	Response to Motion Requested. (Due December 18, 2017)
Nov 30 2017	Brief amicus curiae of Legal Center for Defense of Life filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 04 2017	Brief amici curiae of The States of Texas, et al. filed. **Main Document** **Certificate of Word Count** **Certificate of Word Count**
Dec 04 2017	Brief of respondent Rochelle Garza, as Guardian ad Litem to Unaccompanied Minor J.D. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 18 2017	Motion to lodge non-record material under seal with redacted copies for the public record filed by petitioners.
Dec 18 2017	Letter in response to the motion to lodge non-record material under seal with redacted copies for the public record filed by respondent.
Dec 19 2017	Reply of petitioners Eric D. Hargan, et al. filed. **Proof of Service** **Main Document**

Dec 20 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 04 2018	Rescheduled.
Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
Jan 11 2018	Letter of January 11, 2018 from counsel for respondent received. (Distributed)
Jan 16 2018	DISTRIBUTED for Conference of 1/19/2018.
Jan 18 2018	Letter of January 18, 2018, from counsel for the petitioners received. (Distributed) **Main Document**
Feb 05 2018	DISTRIBUTED for Conference of 2/16/2018.
Feb 20 2018	DISTRIBUTED for Conference of 2/23/2018.
Feb 26 2018	DISTRIBUTED for Conference of 3/2/2018.
Feb 26 2018	Record Requested.
Feb 26 2018	Record received from the U.S.D.C. for the District of Columbia. The record is electronic and available on PACER. SEALED materials transmitted separately.
Feb 26 2018	Record received from the U.S.C.A. for the D.C. Circuit. The record is electronic and available on PACER. SEALED materials transmitted separately.
Mar 12 2018	DISTRIBUTED for Conference of 3/16/2018.
Mar 19 2018	DISTRIBUTED for Conference of 3/23/2018.
Mar 26 2018	DISTRIBUTED for Conference of 3/29/2018.
Apr 02 2018	Letter of respondent Rochelle Garza, as Guardian ad Litem to Unaccompanied Minor J.D. filed. **Other** **Main Document**
Apr 09 2018	DISTRIBUTED for Conference of 4/13/2018.
Apr 16 2018	DISTRIBUTED for Conference of 4/20/2018.

Apr 23 2018	DISTRIBUTED for Conference of 4/27/2018.
May 07 2018	DISTRIBUTED for Conference of 5/10/2018.
May 14 2018	DISTRIBUTED for Conference of 5/17/2018.
May 21 2018	DISTRIBUTED for Conference of 5/24/2018.
May 29 2018	DISTRIBUTED for Conference of 5/31/2018.
Jun 04 2018	Motion to lodge non-record material under seal with redacted copies for the public record GRANTED.
Jun 04 2018	The petition for a writ of certiorari is granted. The en banc order of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that court with instructions to direct the District Court to dismiss the relevant individual claim for injunctive relief as moot. See United States v. Munsingwear, Inc., 340 U. S. 36 (1950). **Opinion** per curiam. (Detached **Opinion**)
Jul 06 2018	JUDGMENT ISSUED.

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RECORD AND BRIEFS

17-654

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No.

In the Supreme Court of the United States

ERIC HARGAN, ET AL., PETITIONERS

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgment and instruct that court to remand the case to the district court with directions to dismiss all claims for prospective relief regarding pregnant unaccompanied minors.

PARTIES TO THE PROCEEDING

The petitioners are Eric D. Hargan, Acting Secretary, U.S. Department of Health and Human Services; Stephen Wagner, Acting Assistant Secretary, Administration for Children and Families; and Scott Lloyd, Director, Office of Refugee Resettlement, in their official capacities.

The respondent is Rochelle Garza, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated.

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In the Supreme Court of the United States

No.

ERIC HARGAN, ET AL., PETITIONERS

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 18a-64a) is not published in the Federal Reporter, but is available at 2017 WL 4791102. A prior opinion of the court of appeals (App., *infra*, 1a-3a) is unreported. Another prior opinion of the court of appeals is not published in the Federal Reporter but is available at 2017 WL 4707112.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 75a-94a.

STATEMENT

On the afternoon of October 24, the lower courts held that the government had to immediately facilitate the pre-abortion counseling and abortion sought by an unaccompanied alien minor who was apprehended unlawfully entering the United States, who has declined to request voluntary departure to her home country, and who thus is in the government's custody. Under Texas state law, the counseling and abortion must be performed by the same physician and separated by at least 24 hours. When Ms. Doe could not receive counseling from a physician on the evening of October 24, her representatives informed the government that her appointment would be moved to the morning of October 25, pushing the abortion procedure to October 26. The government asked to be kept informed of the timing of Ms. Doe's abortion procedure, and one of respondent's counsel agreed to do so.

Based on those representations, the government informed this Court's Clerk's Office and respondent's counsel that it would file a stay application the following morning, October 25. At that point, by their own account, Ms. Doe's representatives did three things: they secured the services of Ms. Doe's original physician (who had provided counseling the previous week), moved her appointment from 7:30 to 4:15 a.m. on the morning of October 25, and changed the appointment from counseling to an abortion. Although Ms. Doe's representatives informed the government of the change

in timing, they did not inform the government of the other two developments—which kept the government in the dark about when Ms. Doe was scheduled to have an abortion. The government did not learn that critical fact until shelter personnel arrived with Ms. Doe at the clinic for her early-morning appointment on October 25. The government's efforts to reach respondent's counsel were met with silence, until approximately 10 a.m. Eastern Time, when one of respondent's counsel notified the government that Ms. Doe had undergone an abortion.

1. When an unaccompanied alien minor enters the United States, the U.S. Department of Health and Human Services (HHS) is normally responsible for the minor's care and custody pending completion of immigration proceedings. See 8 U.S.C. 1232(b)(1). HHS exercises this responsibility through its Office of Refugee Resettlement (ORR), which contracts with various private entities that operate shelters and detention centers for these minors. See ORR, HHS, *Children Entering the United States Unaccompanied: Section 1* (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.1.

Generally, a minor has the immediate opportunity to identify an adult sponsor in the United States to whom the minor can be released, with preference given to the minor's relatives within the United States (if any), though non-relatives can qualify to be sponsors. HHS promptly pursues that opportunity and works with the minor and her family to help identify and consider potential sponsors. See 8 U.S.C. 1232(c)(3); ORR, HHS, *Children Entering the United States Unaccompanied: Section 2* (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-

section-2; 10/23/17 Jonathan White Decl. (10/23/17 White Decl.) 2-4 (filed under seal; redacted version filed Oct. 31, 2017).

Once a prospective sponsor applies, HHS determines whether the applicant is "capable of providing for the child's physical and mental well-being," which must "include verification of the [applicant's] identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." 8 U.S.C. 1232(c)(3)(A). HHS also may, and in some cases must, conduct a home study. 8 U.S.C. 1232(c)(3)(B). If no suitable sponsor is found, and the minor does not voluntarily depart the country, see 8 U.S.C. 1229c; 8 C.F.R. 1240.26, the minor normally remains in an HHS-contracted shelter or other facility until the age of 18.

2. Jane Doe is 17 years old. In early September 2017, she was apprehended at the border as an unaccompanied minor entering the United States without authorization, and was placed in HHS custody. She is currently cared for by a federal grantee at a shelter in Texas. App., *infra*, 68a.

Following her arrival, Ms. Doe was given a medical examination, after which she was informed that she was pregnant. App., *infra*, 69a. Shelter staff also asked Ms. Doe about persons who might sponsor her in the United States. 10/23/17 White Decl. 2. Two were identified and called, but they chose not to apply. *Ibid.* Upon learning this, Ms. Doe informed shelter staff that she desired to return to her country of origin, but she did not file formal papers to do so. *Ibid.* Shelter staff continued to work with Ms. Doe, those potential sponsors, and other

family members by phone to help Ms. Doe identify other potential sponsors. *Id.* at 3.

Ms. Doe subsequently requested an abortion, which under Texas law cannot be provided to a minor absent parental consent or a judicial bypass. App., *infra*, 69a; Compl. 4. On September 25, 2017, a Texas state court granted Ms. Doe a bypass, and also appointed a guardian ad litem and an attorney ad litem. App., *infra*, 69a; 10/13/17 Brigitte Amiri Decl. (Amiri Decl.) 1.

Texas law further requires that an individual who seeks to have an abortion receive counseling at least 24 hours in advance of the procedure, and that the counseling be conducted by the same doctor who will perform the procedure. App., *infra*, 70a. The Director of ORR evaluated Ms. Doe's request for an abortion and declined to permit Ms. Doe to leave her shelter for purposes of attending the state-mandated counseling session or obtaining an abortion. 10/17/17 Jonathan White Decl. (10/17/17 White Decl.) 2-3; Amiri Decl. 2.

As the ORR's Deputy Director for Children's Programs explained, authorizing Ms. Doe to attend such appointments would entail facilitating an abortion. HHS or shelter staff would need to (and did) attend trips to any appointment to maintain ORR's custody of Ms. Doe. And even if HHS or the shelter did not transport Ms. Doe to the abortion clinic, approval would still require that HHS devote time and staff towards drafting and executing approval documents and providing direction to the shelter on its role in connection with the procedure, and would require that HHS expend resources to monitor Ms. Doe's health after the abortion. 10/17/17 White Decl. 3.

Although ORR thus denied Ms. Doe's request that ORR facilitate an abortion, it continued to look for other

avenues to accommodate her. Shelter staff continued to pursue information Ms. Doe provided about potential sponsors. 10/17/17 White Decl. 4. Indeed, at the time Ms. Doe ultimately underwent an abortion, the government believed that it had identified a potentially suitable sponsor, and it was assisting in compiling the materials for that person's application. See 10/23/17 White Decl. 3. At that time, the government believed that the process could be completed within a week, and it intended to so inform this Court in its stay application. See *id.* at 4.

3. On October 13, 2017, Ms. Doe filed the instant lawsuit, via her guardian ad litem, in the District Court for the District of Columbia. Compl. 11.[1] Ms. Doe sought to bring the action "as a class" on behalf of herself and "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit." *Ibid.* Her complaint alleged six claims: four on behalf of Ms. Doe and the putative class, seeking injunctive relief based on alleged violations of their Fifth Amendment rights to privacy and liberty (Count 1), their First Amendment rights to freedom of speech

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[1] Ms. Doe had previously attempted to challenge the government's actions by seeking to join a lawsuit in the Northern District of California, *ACLU* v. *Burwell*, 16-cv-3539, Docket entry No. 1 (June 24, 2016), and by bringing a habeas corpus action in Texas state court against the shelter and its employees, *In re Doe*, 17-DLL-6644 (107th Jud. Dist. Oct. 5, 2017). The district court in the federal case held that it lacked venue over Ms. Doe's claims. 16-cv-3539 Docket entry No. 102, at 4 (Oct. 11, 2017). The state habeas corpus case was removed to the Southern District of Texas, *Doe* v. *International Educational Services (I.E.S.), Inc.*, 17-cv-211, and subsequently abated until further notice, 17-cv-211 Order 1 (Oct. 18, 2017).

(Count 2), their Fifth Amendment right to "informational privacy" (Count 3), and their rights under the Establishment Clause (Count 4); and two under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on behalf of Ms. Doe only, based on alleged violations of the Fifth Amendment (Count 5), and the First Amendment (Count 6). Compl. 12-15.

At the same time she filed the complaint, Ms. Doe sought a temporary restraining order (TRO) on several claims, including the claim that HHS was violating her Fifth Amendment rights by allegedly prohibiting her from obtaining state-required counseling and an abortion. D. Ct. Doc. 1-10 (Oct. 13, 2017). The government opposed the TRO, arguing that because Ms. Doe had the option of requesting voluntary departure or of finding a sponsor, HHS had not imposed an undue burden on any abortion right. D. Ct. Doc. 10, at 1-2 (Oct. 17, 2017).

Following an emergency hearing on October 18, the district court granted the TRO. The court ordered the government to transport Ms. Doe (or allow her guardian ad litem or attorney ad litem to transport her) to the nearest abortion provider for counseling and an abortion within two to three days. App., *infra*, 72a-73a. In addition, the court restrained the government from forcing Ms. Doe to reveal her abortion decision to anyone, or revealing it to anyone themselves; retaliating against Ms. Doe for her decision to have an abortion; or retaliating or threatening to retaliate against the shelter for any actions it might take to facilitate Ms. Doe's access to counseling or an abortion. *Id.* at 74a. Con-

sistent with the TRO, Ms. Doe received the state-mandated counseling on October 19. Resp. C.A. Opp. to Mot. for Stay 8 n.5 (Oct. 19, 2017).

4. The government immediately filed a notice of appeal and an emergency motion for a stay pending appeal, focusing on Ms. Doe's Fifth Amendment claim. Gov't Emergency Mot. for Stay 7-8 & n.3 (Oct. 18, 2017). A panel of the D.C. Circuit heard argument on the morning of Friday, October 20. C.A. Oral Arg. Mins.

Later that day, a majority of the panel issued a brief order vacating the portion of the TRO that required HHS to transport Ms. Doe (or to allow her to be transported) to either pre-abortion counseling or an abortion appointment. App., *infra*, 1a-2a.[2] The panel majority recognized that if Ms. Doe, who was then approximately 15 weeks pregnant, secured a sponsor, she would be able to lawfully obtain an abortion on her own. *Id.* at 2a; see *id.* at 69a-71a. As the panel majority explained, so long as the sponsorship process "occurs expeditiously," it "does not unduly burden the minor's right" to obtain an abortion. *Id.* at 2a. The panel majority therefore directed the district court to allow until Tuesday, October 31—a period of 11 additional days—for Ms. Doe to identify, and the government to vet and approve, a sponsor. *Ibid.* If a sponsor could not be approved in that time, then the district court could issue any "appropriate order," and the parties could appeal. *Ibid.*

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[2] The panel majority agreed with the parties that the court had jurisdiction because the TRO "was more akin to preliminary injunctive relief and [wa]s therefore appealable under 28 U.S.C. § 1292(a)(1)." App., *infra*, 2a n.1.

Judge Henderson indicated that she concurred in the order, with her reasoning to come within five days. App., *infra*, 3a. Judge Millett dissented. *Id.* at 4a-17a.

5. At approximately 10 p.m. on Sunday, October 22, Ms. Doe filed an emergency petition for rehearing en banc and an emergency motion to recall the mandate in the court of appeals, as well as two new declarations in the district court that were supplied to the court of appeals (one of which raised, for the first time in this proceeding, the suggestion that Ms. Doe might have a claim to remain in the United States because she alleged abuse in her home country). Pet. for Reh'g 12. At approximately 11 p.m. on October 22, the D.C. Circuit ordered the government to respond to the petition for rehearing by 11 a.m. the next morning. 10/22/17 C.A. Order 1. The government did so (and also submitted a sealed declaration calling into question Ms. Doe's abuse allegations). Gov't Response to Pet. for Reh'g.

At approximately 3 p.m. on October 24, a majority of the en banc court of appeals granted the petition for rehearing and denied the government's motion for a stay pending appeal because "the stringent requirements for a stay" had not been met. App., *infra*, 19a. The court also affirmed the substance of the district court's injunctive relief, remanding the case to the district court "for further proceedings to amend the effective dates in * * * its injunction." *Ibid.*; see *id.* at 19a n.1. The en banc majority did not specify its precise reasoning, but stated that it reached its decision "substantially for the reasons set forth in the October 20, 2017 dissenting statement of Circuit Judge Millett," *id.* at 19a, which had argued that "[t]he government's refusal to release J.D. from custody" constituted an undue burden and was tantamount to an "unqualified denial of and flat

prohibition" on the procedure, *id.* at 8a (Millett, J., dissenting). Judge Millett concurred in the en banc order, reiterating and expanding upon her prior reasoning. *Id.* at 21a-34a.

Judge Kavanaugh, joined by Judges Henderson and Griffith, dissented on the ground that "[t]he three-judge panel reached a careful decision that prudently accommodated the competing interests of the parties" and was "dictated by Supreme Court precedent." App., *infra*, 59a (Kavanaugh, J., dissenting). Judge Henderson would have further held that because Ms. Doe is in the United States illegally, and has not developed substantial connections here, she "cannot avail herself of the constitutional rights afforded those legally within our borders," including the right to an abortion. *Id.* at 43a (Henderson, J., dissenting).

6. At approximately 4 p.m. on October 24, Ms. Doe's guardian ad litem filed in the district court an emergency motion to amend the TRO. The motion requested that the TRO be modified to provide that the government make Ms. Doe available "promptly and without delay, on such dates, including today, * * * as shall be specified by [her] guardian ad litem or attorney ad litem, in order to obtain the counseling required by state law and to obtain the abortion procedure." D. Ct. Doc. 27, at 1 (Oct. 24, 2017). According to the motion, the guardian ad litem "has been informed, and represents to the [district c]ourt, that a qualified physician is available at the nearest clinic today, and will be available to perform the procedure tomorrow." *Id.* at 2.

At approximately 5 p.m., without giving the government an opportunity to respond, the district court granted the motion, adopting Ms. Doe's proposed language and ordering the government to make Ms. Doe

immediately available for counseling and an abortion. App., *infra*, 66a. The remainder of the modified TRO was identical to that court's original order. *Id.* at 67a. At approximately 10:30 p.m. that same night, the court entered findings of fact in support of the amended TRO. *Id.* at 68a-71a.

7. The government planned to seek an emergency stay from this Court before Ms. Doe could obtain an abortion. In light of counsel's representations that no abortion would take place until October 26, the government informed this Court and respondent's counsel that it would file an emergency application for a stay on the morning of October 25. Sometime later that evening, Ms. Doe's appointment was changed so that instead of obtaining counseling at 7:30 a.m. on October 25, she would undergo an abortion at 4:15 a.m. that morning, just hours before the government planned to file its stay application. Respondent's representatives did not notify the government or the shelter of the changed nature of the appointment.

a. As explained above, under state law, Ms. Doe was required to attend a counseling session 24 hours before any abortion procedure, and the counseling had to be with the same doctor who would perform the abortion. App., *infra*, 70a.[3] Ms. Doe attended counseling on Thursday, October 19, while the first TRO was in effect. Resp. C.A. Opp. to Mot. for Stay 8 n.5. Respondent's counsel, however, had represented that the doctor who

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[3] See, *e.g.*, D.C. Cir. Oral Arg. 1:13:45-1:15:10, https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByMonday?OpenView&StartKey=201710&Count=37&scode=3 (quoted at App., *infra*, 31a n.6 (Millett, J., concurring)); Resp. C.A. Opp. to Mot. for Stay 8-9; D. Ct. Doc. 1-10, at 1.

was available to perform an abortion (and provide counseling) during the week of October 16 was different than the doctor who would be available to perform the procedure during the week of October 23, when the D.C. Circuit ultimately ruled. *Id.* at 8-9 ("This week, the doctor at the health care facility in South Texas provides abortions until 17.6 weeks. But next week the doctor only provides abortion to 15.6 weeks.").

Counsel's representations to the district court on October 24 confirmed that Ms. Doe would need to participate in a new counseling session and then wait a day before she could undergo an abortion. Counsel asked the court to order the government to make Ms. Doe available "promptly and without delay, on such dates, including today, * * * *in order to obtain the counseling required by state law and to obtain the abortion procedure.*" D. Ct. Doc. 27, at 1 (emphasis added). Counsel stated: "Plaintiff has been informed, and represents to the Court, that a qualified physician is available at the nearest clinic *today*, and will be available to perform the procedure *tomorrow*." *Id.* at 2 (emphasis added). Counsel thus reaffirmed to the court that for Ms. Doe to obtain an abortion, she would need to complete a two-step, 24-hour process.

b. Following the district court's entry of the modified TRO at approximately 5 p.m. on October 24, counsel made similar representations directly to the government. First, Ms. Doe's guardian ad litem, attorney ad litem, and counsel from the American Civil Liberties Union (ACLU) all requested that the Texas shelter transport Ms. Doe to the clinic immediately. See Assistant U.S. Att'y Decl. 2 & Exs. B-D (Nov. 1, 2017) (AUSA Decl.) (lodged with the Court). At 6:13 p.m. on October 24, government counsel contacted respondent's counsel

by telephone, confirming that she was being transported to the clinic and asking to be apprised of the timing of any appointments. Government counsel followed up with an email to respondent's counsel, confirming that the shelter was transporting Ms. Doe to the clinic on October 24, and asking to be notified of the timing of "tomorrow's procedure." Email from Pets. Att'y to Resp. Att'y (Oct. 24, 2017, 18:26 EST) (on file with the Office of the Solicitor General). At 6:28 p.m., respondent's counsel confirmed receipt of the email and phone call, and assured government counsel that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know." Email from Resp. Att'y to Pets. Att'y (Oct. 24, 2017) (on file with the Office of the Solicitor General).

Roughly 45 minutes later, respondent's counsel informed government counsel that the doctor was not able to stay for the appointment that evening, which would be rescheduled for the following morning at 7:30 a.m. Email from Resp. Att'y to Pets. Att'y (Oct. 24, 2017, 19:17 EST) (on file with the Office of the Solicitor General). Around the same time, Ms. Doe's attorney ad litem separately informed the assigned Assistant United States Attorney (AUSA) that Ms. Doe's previous doctor was not available; that it was no longer feasible for Ms. Doe to receive counseling that evening (October 24); and that as a result the abortion could not take place until October 26. Ms. Doe's attorney ad litem further stated that the doctor had agreed to stay for an extra day, in order to perform the abortion on October 26. See AUSA Decl. 2.

c. These representations made clear that the appointment rescheduled for the morning of October 25 would be for counseling, with an abortion to follow no

earlier than the morning of October 26. By their own acknowledgement, respondent's counsel shared that understanding. See Letter from David D. Cole, Nat'l Legal Dir., Am. Civil Liberties Union, to Noel J. Francisco, Solicitor Gen. 2 (Oct. 30, 2017) (ACLU Letter) (lodged with the Court) ("We did not become aware, until late in the evening of October 24, that it might be possible for the physician who had counseled Ms. Doe on October 19 to return to the clinic to perform the abortion on the morning of October 25. It was not clear until the morning of October 25 that he would in fact be able to do so.").

Based on the representations of counsel that no abortion would occur until October 26, at approximately 9 p.m. on October 24, the government informed the Clerk's Office and respondent's counsel that it would file the application the following morning (October 25), which would allow the Court a full day to consider it before Ms. Doe could undergo an abortion. Respondent's counsel confirmed receipt of the email stating the government's intent to file the next morning and did not indicate any plans for an abortion to occur before then.

Later that night, Ms. Doe's guardian ad litem informed the Texas shelter and the AUSA that Ms. Doe's appointment had been moved to 4:15 a.m. Central Time. AUSA Decl. 4 & Ex. K. The email did not explain the reason for the change nor state that the appointment was now for an abortion. *Ibid.* In addition, neither the AUSA nor the shelter was instructed to refrain from giving Ms. Doe food or drink before the appointment, as would have been medically indicated if the appointment were for an abortion. *Id.* at 4 & Exs. I-J. Although the change in the appointment time caused shelter staff to

wonder later that night whether the nature of the appointment also might have changed, see *id.* Ex. M, they were never told that the early-morning appointment would be for an abortion rather than counseling.

Respondent's counsel has now explained that, unbeknownst to the government, at some point "late in the evening of October 24," they became "aware" that "it might be possible for the physician who had counseled Ms. Doe on October 19 to return to the clinic to perform the abortion on the morning of October 25." ACLU Letter 2. Respondent's counsel has further explained that at some point early in the morning of October 25, it became "clear" that the original doctor "would in fact be able to" perform the procedure that morning. *Ibid.* Significantly, however, respondent's counsel did not notify the government of this possibility—notwithstanding their earlier acquiescence in a request to keep government counsel informed of the timing of the "procedure" and the government's subsequent notice of its intent to seek relief in this Court that same morning.

At 4:15 a.m. Central Time on the morning of October 25, shelter staff arrived with Ms. Doe at the clinic. At 4:30 a.m. Central Time, shelter staff emailed government personnel that the clinic had indicated that Ms. Doe would be undergoing an abortion. AUSA Decl. 4-5 & Ex. M. After receiving that information, government counsel twice emailed respondent's counsel to inquire as to the nature of the appointment. Two hours after the government's first email was sent, counsel informed the government that Ms. Doe "had the abortion this morning." Email from Resp. Att'y to Pets. Att'y (Oct. 25, 2017; 10:00 EST) (on file with the Office of the Solicitor General). Because these developments precluded

any possibility of effective relief, the government did not file its stay application with the Court.

8. On October 26, the Solicitor General wrote to the National Legal Director of the ACLU, which represents respondent in this case. Letter from Noel J. Francisco, Solicitor Gen., to David D. Cole, Nat'l Legal Dir., Am. Civil Liberties Union 1-4 (Oct. 26, 2017) (SG Letter) (lodged with the Court). The Solicitor General recounted the above series of events, *ibid.*, and expressed his concern that "ACLU attorneys misled the Department of Justice about when Jane Doe would undergo an abortion, thereby preventing the Department from seeking Supreme Court review," *id.* at 1. The Solicitor General stated that "[i]f such conduct occurred, it would be contrary to those attorneys' obligations and responsibilities as officers of the Court," *ibid.*, and he requested "the favor of a response * * * so that I may determine whether to raise this incident with the Court," *id.* at 4.

On the morning of Monday, October 30, the ACLU responded to the Solicitor General's letter. ACLU Letter 1-2. In its view, the government's concern is "unfounded," because ACLU attorneys "were in touch with the government about the timing of Ms. Doe's appointments for the sole purpose of ensuring that the shelter would abide by the court order to transport her at the appropriate times," and "[c]ounsel never agreed to provide the government information about the nature of Ms. Doe's appointments or to give the government advance notice of the imminence of the abortion." *Id.* at 1. The ACLU did not address government counsel's request on October 24 to be notified of the timing of Ms. Doe's abortion, or ACLU counsel's response that "[a]s

soon as we understand the clinic's schedule tomorrow we will let you know," p. 13, *supra*.

The ACLU further explained that, as noted above, it "did not become aware, until late in the evening of October 24, that it might be possible for the physician" who had previously counseled Ms. Doe to "perform the abortion on the morning of October 25," and that "[i]t was not clear until the morning of October 25 that he would in fact be able to do so." ACLU Letter 2. The ACLU did not say whether those events were a response to the government's notice that it intended to file a stay application with the Court the following morning, and thus whether respondent's counsel attempted to prevent this Court's review. The ACLU also did not dispute that Ms. Doe's representatives had repeatedly informed the courts and government counsel that Ms. Doe would need to attend a new counseling session with a new doctor and wait 24 hours before she could obtain an abortion; that Ms. Doe's attorney ad litem had specifically informed the government that the abortion would take place on October 26; and that respondent's counsel was aware that the United States would seek a stay from this Court on the morning of October 25. Without addressing any of those facts, the ACLU concluded that it was "under no legal, ethical, or self-imposed obligation" to "facilitate the government's ability" to seek a stay from this Court by informing the government that Ms. Doe would obtain an abortion in the early morning hours of October 25. *Ibid.*

REASONS FOR GRANTING THE PETITION

This appeal presented the question whether the government must facilitate access to an abortion that is not medically necessary to preserve the life or health of an

unaccompanied alien minor who was apprehended unlawfully entering the United States, who declines to request voluntary departure to her home country, who has not yet identified a qualified sponsor to whom she can be released, and who thus is in the government's custody. The answer to that question is no. Under this Court's case law, the government may adopt policies favoring life over abortion; it is not obligated to facilitate abortion; and the government acts permissibly when it does not place an undue burden in a woman's path. Here, the government imposed no undue burden: Ms. Doe contended that the government's actions as her custodian were obstructing her access to an abortion in violation of the Fifth Amendment, but she could have left government custody by seeking voluntary departure, or by working with the government to identify a suitable sponsor who could take custody of her in the United States. Given those options, the government was under no obligation to facilitate Ms. Doe's abortion.

The divided en banc court of appeals reached the contrary conclusion on the afternoon of October 24. Over the dissent of three judges, without holding oral argument, and after requiring the government to oppose the petition for rehearing en banc literally overnight, the en banc court vacated the panel majority's decision that had put in place a modest period of time—11 additional days—for the parties to secure a sponsor to whom Ms. Doe could be released. That narrow ruling, which had the potential to permit Ms. Doe to access an abortion without requiring the government to facilitate it, was far more appropriate in the circumstances of this case than the en banc court's sweeping constitutional rule and the district court's order for immediate relief that would be final rather than "temporary."

The government therefore was prepared to seek emergency relief from this Court, both because it disagreed with the merits of the en banc court's ruling and because HHS believed it had identified a potential sponsor. But Ms. Doe's counsel ensured that did not happen. Although they had represented to the government that, in light of Texas law and logistical constraints, no abortion would occur until the morning of October 26—and although the government had relied on those representations in deciding to file its application for a stay on the morning of October 25 and informed respondent's counsel of its intent to so file—Ms. Doe then underwent an abortion a few hours before the government would seek relief from this Court. Respondent's counsel provided no notice to the government of that critical development, despite their previous acquiescence in government counsel's request that the government be kept informed of the scheduling of the abortion "procedure."

In light of these circumstances, and the fact that the appeal was mooted before this Court's review based on the "unilateral action of the party who prevailed below," *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994), this Court should apply its longstanding practice of vacating the judgment of the court of appeals and remanding the case to that court with instructions to direct the district court to dismiss all claims that are now moot, *i.e.*, all claims for prospective relief regarding pregnant unaccompanied minors.

1. The portions of the TRO addressed by the court of appeals—those requiring the government to make Ms. Doe available for pre-abortion counseling and an abortion, and restraining the government from interfering with her access to those services—are now moot.

According to respondent's counsel, Ms. Doe has undergone an abortion. Moreover, no exception to the mootness doctrine applies. The government did not voluntarily cease its conduct, and Ms. Doe's claims regarding access to abortion are not capable of repetition yet evading review because there is no "reasonable expectation that the same complaining party" (*i.e.*, Ms. Doe) will again become pregnant and seek an abortion while in government custody. *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted).

2. When, as here, an appeal becomes moot "while on its way [to this Court] or pending [a] decision on the merits," this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see *id.* at 39 n.2; see also, *e.g.*, *Trump* v. *Hawaii*, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017); *Karcher* v. *May*, 484 U.S. 72, 82 (1987); *Burke* v. *Barnes*, 479 U.S. 361, 365 (1987); *Duke Power Co.* v. *Greenwood Cnty.*, 299 U.S. 259, 267 (1936) (per curiam). This Court has followed that approach in "countless cases," *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and it is the "normal" procedure in the event of mootness, *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011). The rule serves important purposes: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25. At the same time, "[v]acatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from

opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (citation omitted). The case for vacatur is especially strong here for three reasons.

a. First, the United States was denied review by the actions of opposing counsel. Vacatur is fundamentally an "equitable remedy" that recognizes "[a] party who seeks review of the merits of an adverse ruling * * * ought not in fairness be forced to acquiesce in the judgment" when "mootness results from unilateral action of the party who prevailed below." *Bonner Mall*, 513 U.S. at 25; see, *e.g.*, *Arizonans for Official English*, 520 U.S. at 75 ("agree[ing]" with State's position that "[i]t would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment") (citation omitted; second, third, and fourth brackets in original). That is precisely what would happen absent vacatur in this case. Ms. Doe obtained a favorable judgment from the court of appeals, and then mooted that judgment by undergoing an abortion hours before her counsel knew the government would seek review in this Court, and without counsel's notifying the government of the changed nature of the early morning appointment. In these circumstances, the government should not be forced to "acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25.

b. Second, vacatur is appropriate because, absent mootness, this Court likely would have granted certiorari. The en banc majority's disposition of Ms. Doe's Fifth Amendment claim warranted this Court's review. Over the dissent of three judges, the en banc majority ordered the government to make Ms. Doe—an unaccompanied minor who was apprehended entering the

United States unlawfully, who has refused to request voluntary departure to her home country, who has not yet located a qualified sponsor to whom she can be released, and who thus is in government custody—immediately available for counseling and an abortion. It ordered that irreversible procedure in the form of "temporary" or "preliminary" relief; without holding oral argument; and after requiring the government to oppose the motion for rehearing en banc literally overnight. The en banc majority did so even though there is no precedent from this Court (or any court) holding that the federal government imposes an "undue burden" by refusing to facilitate access to an abortion for a pregnant unaccompanied minor who retains the freedom to leave government custody by returning to her home country or by helping to identify a suitable sponsor. Moreover, this Court has repeatedly made clear that the government generally need not facilitate abortions. See *Planned Parenthood* v. *Casey*, 505 U.S. 833, 846 (1992); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 509 (1989); *Harris* v. *McRae*, 448 U.S. 297, 315-316 (1980); *Maher* v. *Roe*, 432 U.S. 464, 471-474 (1977).

The en banc majority jettisoned the panel majority's far more moderate decision, which gave the parties a brief additional period of time to secure an acceptable sponsor for Ms. Doe. As the panel majority recognized, such a short pause in the proceedings would not have constituted an undue burden, and it had the potential to remove any alleged government obstacle to Ms. Doe's obtaining an abortion, while also ensuring that the government was not required to facilitate the procedure. In fact, at the time the en banc court ruled, we had been informed by HHS that a potential sponsor had been

identified, HHS was assisting that person with the application, and HHS believed that the approval process could be completed within a week (assuming the individual applied and was qualified). The government intended to so inform this Court in its stay application. Given the extraordinary circumstances here, the government respectfully submits it is reasonably likely that the Court would have granted the government's stay application and its petition for a writ of certiorari.[4]

c. Third, this Court explained in *Munsingwear* that "a judgment, unreviewable because of mootness," should not be permitted to "spawn[] any legal consequences." 340 U.S. at 41; see *Camreta*, 563 U.S. at 713. Here, the court of appeals' decision on Ms. Doe's now-moot claim for injunctive relief could have significant legal consequences: Ms. Doe also seeks damages for her Fifth Amendment claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Compl. 14-15; *Town of Chester* v. *LaRoe Estates, Inc.*, 137 S. Ct. 1645, 1651 & n.3 (2017)

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[4] The United States has argued that when a case has become moot after the court of appeals' ruling, but before a petition for certiorari is granted, this Court ordinarily should decline to vacate the decision below if the case would not have warranted review on the merits. See Stephen M. Shapiro et al., *Supreme Court Practice* § 5.13, at 357-358, 968 n.33 (10th ed. 2013); see, *e.g.*, Gov't Amicus Br. at 10, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31). For the reasons discussed above, this Court likely would have granted the government's stay application and its petition for certiorari; vacating the decision below therefore would be fully consistent with the practice the government has urged in other cases. In any event, even if review were not otherwise warranted under different circumstances, vacatur still would be appropriate in the circumstances of this case because the government's reasonable reliance on the representations of opposing counsel frustrated the government's opportunity to seek this Court's review.

(noting that "standing is not dispensed in gross" because a case or controversy must exist with respect to each claim) (quoting *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 734 (2008)). Although the individual defendants have additional defenses to that claim, their future litigation should not be constrained by the D.C. Circuit's "preliminary" adjudication of the merits of the Fifth Amendment claim. *Camreta*, 563 U.S. at 713.

Moreover, Ms. Doe, through her guardian ad litem, brought this case as a putative class action on behalf of herself and "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit." Compl. 11. If the decision below is not vacated—and the putative class members' claims are not dismissed, see pp. 25-26, *infra*—it could be applied to those claims for relief. That would squarely implicate one of vacatur's key purposes: "clear[ing] the path for future relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40. The en banc court's decision should not be left on the books for use by these and other plaintiffs.

3. Under *Munsingwear*, this Court's general practice is to vacate the decision below and remand with instructions that the case be dismissed. 340 U.S. at 39. Here, however, Ms. Doe's abortion did not necessarily moot all of her claims: Counts 5 and 6 seek damages under *Bivens*, *supra*, and some of her claims for prospective relief involve the government's potential post-abortion conduct, such as disclosure of the fact that an abortion has occurred. See Compl. 14-15. Thus, the appropriate disposition is for the Court to vacate the judg-

ment below and remand to the court of appeals with instructions to direct the district court to dismiss Ms. Doe's claims for injunctive relief insofar as they relate to the government's treatment of pregnant unaccompanied minors. Ms. Doe is no longer pregnant and has no ongoing interest in those claims.

That Ms. Doe filed this complaint as a putative class action does not change the analysis. See Compl. 11. A putative class action, or particular claims within it, generally will become moot once the named plaintiff's claims no longer present a live controversy. *Board of Sch. Comm'rs* v. *Jacobs*, 420 U.S. 128, 129 (1975) (per curiam). This Court has recognized an exception when "the named plaintiff's individual claim becomes moot *after*" the district court rules on class certification, *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 74 (2013), but that rule does not apply here because this case never reached that juncture. Ms. Doe filed her motion for class certification just one week before she obtained an abortion; the government has not yet responded to the motion; and the district court has not yet ruled on it. D. Ct. Doc. 18 (Oct. 18, 2017); see *Genesis Healthcare Corp.*, 569 U.S. at 75.

Nor are the putative class claims regarding pregnant minors saved by the further exception for claims that "are 'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *Genesis Healthcare Corp.*, 569 U.S. at 76 (citation omitted); see *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991) (applying exception in context of individuals held without probable cause determinations); *Gerstein* v. *Pugh*, 420 U.S. 105, 110 n.11

(1975) (same). We simply do not know whether the district court could have ruled on Ms. Doe's motion for class certification before her interest in the claims for pre-abortion injunctive relief otherwise would have expired. The district court's consideration was cut short not because Ms. Doe's pregnancy came to term, or even because she obtained an abortion after an orderly appellate process. It was cut short because Ms. Doe underwent an abortion one week after filing her motion for class certification—and just hours before (as her counsel knew) the government would seek further review.

4. Finally, in light of the extraordinary circumstances of this case, the government respectfully submits that this Court may wish to issue an order to show cause why disciplinary action should not be taken against respondent's counsel—either directly by this Court or through referral to the state bars to which counsel belong—for what appear to be material misrepresentations and omissions to government counsel designed to thwart this Court's review. See Sup. Ct. R. 8.2 ("After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar.").[5]

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[5] See also, *e.g.*, *In re Discipline of Shipley*, 135 S. Ct. 779 (2014) (order to show cause why attorney should not be sanctioned for his conduct as a member of the Bar of this Court); *In re Sibley*, 63 S. Ct. 203 (1942) (same); *In re Hall*, 57 S. Ct. 107 (1936) (disbarring attorney for conduct unbecoming a member of the Bar of this Court); *In re Davis*, 289 U.S. 704 (1933) (order to show cause for same); *In re Gilbert*, 276 U.S. 294 (1928) (imposing sanctions for same); *In re Moore*, 177 F. Supp. 2d 197, 199 (S.D.N.Y. 2001) (sug-

Respondent's counsel have taken the position that they did not have "any legal or ethical obligation" to keep the government informed of the timing of Ms. Doe's abortion. ACLU Letter 1. Perhaps that would be true if there had not been numerous filings and representations by counsel about the timing of that procedure. But they repeatedly represented—to courts and government counsel—that Ms. Doe would need to attend a new counseling session with a new doctor and wait 24 hours before she could obtain an abortion. Those representations were part of their request for immediate relief from the district court, which the court granted shortly after the court of appeals' ruling. Once the district court did so, government counsel asked to be notified of the timing of Ms. Doe's abortion, and respondent's counsel responded that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know," p. 13, *supra*. Ms. Doe's attorney ad litem separately informed the AUSA that the doctor had agreed to stay an extra day, so that the abortion would take place on October 26.

It was against that backdrop that the government decided to file its stay application on the morning of October 25, which should have allowed a full day for this Court to consider the application (and the government's accompanying request for an administrative stay) before Ms. Doe underwent an abortion. The government informed respondent's counsel of its intent to file the next morning. As the ACLU has now explained, at some point thereafter—and perhaps as a response to the government's notice—Ms. Doe's representatives secured

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gesting that this Court's order debarring attorney, *In re Disbarment of Moore*, 529 U.S. 1127 (2000), was based on conduct unbecoming a member of the Bar).

the services of her original physician and changed the purpose of her October 25 morning appointment. See ACLU Letter 2. Given the dealings between the parties, respondent's counsel at least arguably had an obligation to notify the government of this incredibly significant development. Applicants for emergency relief—for instance, in the capital context—often face imminent action by the opposing party, and in the absence of judicial relief, the challenged action generally may proceed. But that does not mean that those planning to take authorized action may covertly change its timing, without notice to those affected by the change and in full awareness that opposing counsel has relied upon previous representations. The government recognizes that respondent's counsel have a duty to zealously advocate on behalf of their client, but they also have duties to this Court and to the Bar. It appears under the circumstances that those duties may have been violated, and that disciplinary action may therefore be warranted. At the least, this Court may wish to seek an explanation from counsel regarding this highly unusual chain of events.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand to the district court for dismissal of all claims for prospective relief regarding pregnant unaccompanied minors.

Respectfully submitted.

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CHAD A. READLER
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NOVEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5236
Sept. Term, 2017
1:17-cv-02122-TSC

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, APPELLEE

v.

ERIC D. HARGAN, ACTING SECRETARY, HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

Filed on: Oct. 20, 2017

ORDER

BEFORE: HENDERSON,* KAVANAUGH, and MILLETT,** Circuit Judges

Upon consideration of the emergency motion for stay pending appeal, the opposition, the supplement thereto, and the reply; the brief of amici curiae; the administrative stay entered on October 19, 2017; and the oral argument of the parties, it is

ORDERED that the administrative stay be dissolved. It is

FURTHER ORDERED that the District Court's temporary restraining order entered on October 18,

2017, be vacated as to paragraphs 1 and 2 of the order and that the case be remanded to the District Court.[1]

The Government argues that, pursuant to standard HHS policy, a sponsor may be secured for a minor unlawful immigrant in HHS custody, including for a minor who is seeking an abortion. The Government argues that this process—by which a minor is released from HHS custody to a sponsor—does not unduly burden the minor's right under Supreme Court precedent to an abortion. We agree, so long as the process of securing a sponsor to whom the minor is released occurs expeditiously. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 513 (1990). The District Court is directed to allow HHS until Tuesday, October 31, 2017, at 5:00 p.m. Eastern Time for a sponsor to be secured for J.D. and for J.D. to be released to the sponsor. If a sponsor is secured and J.D. is released from HHS custody to the sponsor, HHS agrees that J.D. then will be lawfully able, if she chooses, to obtain an abortion on her own pursuant to the relevant state law. If a sponsor is not secured and J.D. is not released to the sponsor by that time, the District Court may re-enter a temporary restraining order, preliminary injunction, or other appropriate order, and the Government or J.D. may, if they choose, immediately appeal. We note that the Government has assumed, for purposes of this case, that J.D.—an unlawful immi-

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[1] As both parties agree, we have jurisdiction over this appeal because the District Court's temporary restraining order was more akin to preliminary injunctive relief and is therefore appealable under 28 U.S.C. § 1292(a)(1). *See Sampson v. Murray*, 415 U.S. 61, 86 n.58 (1974).

grant who apparently was detained shortly after unlawfully crossing the border into the United States—possesses a constitutional right to obtain an abortion in the United States. It is

FURTHER ORDERED that the emergency motion for stay pending appeal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the District Court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Robert J. Cavello
Deputy Clerk

* Although Circuit Judge Henderson concurs in this order, her reasoning therefor will follow in a separate statement to be filed within five days of the date of this order.

** Circuit Judge Millett would deny the emergency motion for stay. A statement by Judge Millett, dissenting from the disposition of this case, will issue shortly.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5236
Sept. Term, 2017
1:17-cv-02122-TSC

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, APPELLEE

v.

ERIC D. HARGAN, ACTING SECRETARY, HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

Filed on: Oct. 20, 2017

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk issue the attached statement of Circuit Judge Millett, dissenting from the disposition of this case.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

MILLETT, *Circuit Judge*, dissenting from the disposition of the case.

There are no winners in cases like these. But there sure are losers. As of today, J.D. has already been forced by the government to continue an unwanted pregnancy for almost four weeks, and now, as a result of this order, must continue to carry that pregnancy for multiple more weeks. Forcing her to continue an unwanted pregnancy just in the hopes of finding a sponsor that has not been found in the past six weeks sacrifices J.D.'s constitutional liberty, autonomy, and personal dignity for no justifiable governmental reason. The flat barrier that the government has interposed to her knowing and informed decision to end the pregnancy defies controlling Supreme Court precedent.

To escape terrible physical abuse in her family, a seventeen-year-old girl known here as J.D. fled her home country and all she has ever known, and all alone undertook a life-imperiling trek for hundreds, perhaps thousands, of miles seeking safety. Unaccompanied minor migrants are among the most vulnerable persons in the world. J.D.'s journey exposed her to a tragically high risk of physical abuse, rape, and sexual exploitation at the hands of other migrants, smugglers, and governmental officials in every country whose territory she crossed.[1]

After entering the United States, she was detained by federal immigration officials and, at that time,

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[1] *See generally* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, WOMEN ON THE RUN (2015), http://www.unhcr.org/5630f24c6.html; UNICEF, HUMAN TRAFFICKING FOR SEXUAL EXPLOITATION PURPOSES IN GUATEMALA (2016), http://www.cicig.org/uploads/documents/2016/Trata_Ing_978_9929_40_829_6.pdf.

learned that she is pregnant. Alone, resourceless, and facing a perilous future, J.D. was appointed a guardian *ad litem* and, in compliance with Texas law, obtained a state court order determining that she was (and is) mature enough to decide for herself whether to continue the pregnancy. J.D. has also gone through the mandatory counseling required by Texas law and has reconfirmed her decision. Indeed, the United States does not dispute that J.D. is mature enough to determine her own best interests, nor has it identified any reason that it is not in her best interests to exercise the choice she made, other than a federal agency's own opposition to abortion. The federal government further represents that it would trust her judgment, if only she had chosen to continue the pregnancy. But J.D. chose not to continue her pregnancy.

The United States has for weeks now refused to release J.D. into the custody of her guardian *ad litem* to obtain the abortion. It is undisputed that J.D.'s guardian and attorneys—not the federal government—will transport her and bear the costs of the abortion procedure. The logistics and paperwork of transferring her to the custody of her guardian *ad litem* will all be handled by a government contractor that is fully willing to do so. TRO Hr'g Tr. at 4:3-5. It will not be done directly by any federal governmental official. And J.D.'s post-procedure medical care will be administered by the contractor, not by government officials themselves. The Department of Health and Human Services' only task is to *refrain* from barring its contractor from allowing J.D. to receive the medical care.

The government does not dispute—in fact, it has knowingly and deliberately chosen not to challenge—

J.D.'s constitutional right to an abortion. The government instead says that it can have its contractor keep J.D. in what the government calls "close" custody —that is, more restrictive conditions than the contractor imposes on the non-pregnant minors in its care— because of the agency's own supervening judgment that it would be in J.D.'s best interests to carry the pregnancy to term. If she wants an abortion, the government continues, she must surrender all legal claims to remain in the United States and return to the country of her abuse.

That is wrong and that is unconstitutional.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), which was reaffirmed just last year in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), should decide this case. In *Casey*, the Court held that a "woman's right to terminate her pregnancy before viability" is "a rule of law and a component of liberty we cannot renounce." 505 U.S. at 871. "[I]t follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy" at the pre-viability stage. *Id.* at 869. That liberty is necessary, the Court added, to protect "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," and "central to the liberty protected" by the Due Process Clause. *Id.* at 851. The Constitution's guarantee of due process thus protects that right for "any person," U.S. CONST. Amend. V, against undue governmental interference. While the government can have its own interest in promoting the continuation of pregnancy and potential life, prior to viability the government may not place a "substantial

obstacle" in the way of a woman's right to decide for herself to discontinue a pregnancy. *Whole Woman's Health*, 136 S. Ct. at 2309. Setting up substantial barriers to the woman's choice violates the Constitution. That is settled, binding Supreme Court precedent.

What is forcing J.D. to carry on this pregnancy is not J.D.'s choice. It is not Texas law. It is the federal government's refusal to allow an abortion to go forward. The government's refusal to release J.D. from custody is not just a substantial obstacle; it is a full-on, unqualified denial of and flat prohibition on J.D.'s right to make her own reproductive choice.

What reason does the federal government offer for taking over J.D.'s decision completely and forcing her to continue an unwanted pregnancy that Texas law permits her to terminate? None that remotely qualifies under the Constitution, or that even makes sense.

First, the government says it does not want to "facilitate" the abortion. But there is nothing for it to facilitate. As noted, J.D. will be transported to the medical procedure by her guardian *ad litem*. Any expense will be fully born by her guardian and attorneys. All paperwork and medical care will be done by a government contractor. And, as government counsel conceded at oral argument, the court order under review made it unnecessary for the Department of Health and Human Services to decide for itself whether the procedure is in J.D.'s best interests from a federal government perspective.

For those reasons, the government's reliance on cases recognizing the government's ability to prefer that pregnancies be taken to term, to provide information about its views, and to require informed consent

through processes that do not unduly burden the woman's choice are of no help. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980). The government identifies no case that says the government has a right to flatly prohibit an abortion—to override the woman's choice—by virtue of keeping her in custody. And to be clear, it is a custody from which the government would willingly release her to attend doctor appointments if she were to continue her pregnancy. (No risk of flight or danger to the community has even been whispered in this case.) So what the government really claims here is not a right to avoid subsidizing the abortion decision; it claims a right to use *immigration* custody to nullify J.D.'s constitutional right to reproductive autonomy prior to viability.

Second, custody does not empower the government to completely override a woman's informed and volitional decision to have an abortion. *See Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) (striking as unconstitutional a prohibition on abortion for prisoners with exceptions only for express approval and where necessary for the health of the mother); *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (striking as unconstitutional a policy requiring prisoners to obtain a court ordered release on their own recognizance in order to receive an abortion).

What is more, the government's insistence that it must not even stand back and permit an abortion to go forward for someone in some form of custody is freakishly erratic. The government admits that, if J.D. were an adult, she would be held in the custody of Immigration and Customs Enforcement (ICE). That means that the government permits women just a few months

older than J.D. who are in ICE custody to obtain an abortion.[2] Likewise, it facilitates the process so that women in the custody of the Bureau of Prisons can obtain abortions. 28 C.F.R. § 551.23.

So why is J.D.'s case any different? The government says that, because she is a minor, an official in the Department of Health and Human Services must independently agree that an abortion is in J.D.'s best interests. And this Administration refuses to so agree. Without any explanation other than its opposition to abortion. In so doing, the federal government distrusts the State of Texas, which has conducted a hearing pursuant to state law and authorized J.D. to make the decision herself and to decide whether continuing or terminating the pregnancy is in her own best interest in this respect. J.D. may make that decision without the consent of her "parent, managing conservator or guardian." Texas Family Code § 33.003(i-3). Notwithstanding the States' constitutional primacy in matters of domestic relations, *e.g.*, *Mansell v. Mansell*, 490 U.S. 581, 587 (1989), the United States argues that a federal government official in Washington, D.C. is better positioned and has more authority under the Constitution to prevent an abortion than not only the State, but also *the woman and any parent or husband or father of the child*. At least, until the woman turns 18. No judicial bypass exists for that federal official's decision. That is an astonishing power grab, and it flies in the teeth of decades of Supreme Court precedent preserving and protecting the fundamental right of a wo-

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[2] ICE Guidelines, Detention Standard 4.4, Medical Care, available at *https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf*.

man to make an informed choice whether to continue a pregnancy at this early stage.

Third, the government says that J.D. is free to get an abortion as long as she agrees to voluntarily depart the United States. But the government cannot condition the exercise of a constitutional right by women and girls on their surrender of other legal rights. The fact that J.D. entered the United States without proper documentation does *not* mean that she has no legal right to stay here to be safe from abuse or persecution. The Statue of Liberty's promise to those "homeless" "yearning to breathe free" is not a lie.

Federal law, for example, expressly permits juvenile immigrants to seek "special immigrant juvenile status" by showing that they are (i) under 21 years of age, (ii) unmarried, and (iii) dependent juveniles "as a result of abuse, abandonment, or neglect." *Yeoboah v. United States Dep't of Justice*, 345 F.3d 216, 221-222 (3d Cir. 2003); *see* 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

Needless to say, conditioning a woman's exercise of her fundamental right to reproductive choice, *see Casey, supra*, on the surrender of other legal rights is at the least a substantial obstacle to the exercise of her constitutional right. And by the way, this is a Hobson's Choice that the federal government demands only of female immigrants.

The majority here accepts none of those arguments by the government. Instead, the court orders J.D. to continue her pregnancy for weeks. Not because she has failed to follow required State processes. She has met every requirement. And not because the majority agrees that the federal government can exercise an unbypassable veto over the reproductive decision of a mi-

nor in its custody. The only reason given is an interest in further pursuing the availability of finding a sponsor for J.D.

That too is forbidden by Supreme Court precedent. The desire to find a sponsor for J.D. to release her from detention is understandable. Children are presumably better off with family members or responsible adults than in the custody of a government contractor. But finding a sponsor and allowing her to terminate the pregnancy are not mutually exclusive. Both can proceed simultaneously. So the desire to pursue that process has nothing to do with and is not a reason for forcing J.D. to continue the pregnancy.

Perhaps the majority wants another adult to be involved in J.D.'s reproductive decision. But J.D. has already made that choice with a guardian *ad litem* by her side, and after all the consent processes demanded by Texas law. To force her to continue the pregnancy just in case someone else comes along with whom J.D. might also consult is to impose layers and layers of consent-style barriers to J.D.'s choice, contrary to settled Supreme Court precedent. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976); *Bellotti v. Baird*, 443 U.S. 622, 640-642 (1972) (striking statute requiring minor to obtain the consent of both parents prior to an abortion as unduly burdensome). Even a parent or husband does not have the power that federal government officials now claim to wield. *See id.*

By the way, that distrust of whether J.D. has made an informed-enough-for-the-federal-government decision is a one-way street. It applies only to the decision to end the pregnancy. Had she chosen to continue the

pregnancy, that judgment would have been fully respected and supported by the federal government without any further proceedings. If J.D. is mature enough to decide to continue the pregnancy, then she is mature enough to decide not to continue it as well (as Texas law agrees).

Nor is there any factual basis to think that remand will accomplish anything but a forced continuation of the pregnancy. After at least six weeks of trying, no sponsor has been found. Two were identified, but neither passed muster under Health and Human Services' review. (We are not told why, and counsel for the government could not say whether the sponsors' willingness to support J.D.'s abortion decision played a role in those decisions.) And even if a sponsor suddenly appears, that sponsor cannot override J.D.'s choice given that the judicial bypass order makes the consent of a guardian or custodian unnecessary.

This sponsorship process, moreover, is entirely in the control of the Department of Health and Human Services. J.D. cannot control the timing of the decision, nor is there any apparent procedure for challenging a decision or a delayed non-decision. Nor is there any reason to think that a sponsor can be found in short order. If the federal government knew of a sponsor, it would have come forward with that already. The government does not maintain an active list of potential sponsors, and even if one were identified, there is an understandably rigorous vetting process before a child will be handed into the custody of a third party, which includes (i) interviewing prospective sponsors; (ii) sponsors' completion of extensive paperwork; (iii) a thorough background check, fingerprint check, immigration

Central Index System check; (iv) home visits where necessary; and (v) conducting an assessment of the child's relationships to non-related prospective sponsors.[3] The federal government could not tell the court how long that process would take, even assuming a responsible sponsor would suddenly be found.

And in this context, timing profoundly matters. Every day that goes by is another day that the federal government forces J.D. to carry an unwanted pregnancy forward. Days also increase the health risks associated with an abortion procedure. *See, e.g., Williams v. Zbaraz*, 442 U.S. 1309, 1314-1315 (1979) (Stevens, J., sitting as Circuit Justice) (evidence of an increased risk of "maternal morbidity and mortality" supports a claim of irreparable injury); Linda A. Bartlett, *et al.*, *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, 103:4 OBSTETRICS & GYNECOLOGY 729 (April 2004) (relative risk from abortion increases 38% each gestational week). In addition, if J.D. is 17 or 18 weeks along by the time this issue is resolved, the doctors at the South Texas clinic nearest to her (assuming it still has availability) will likely no longer be willing to perform the procedure. That will force J.D. to travel hundreds of miles to the next closest medical provider in North Texas. She will be forced to endure this journey twice, once to repeat a counseling session she has already received and again for the procedure itself.

The sponsorship remand, in short, stands as an immovable barrier to J.D.'s exercise of her constitutional right that inflicts irreparable injury without any justi-

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[3] https://www.acf hhs.gov/orr/about/ucs/sponsors.

fication offered for why the government can force her to continue the pregnancy until near the cusp of viability.

Lastly, the amici suggest that J.D. and all others in the United States without documentation are not "persons" entitled to the protections of the Due Process Clause. The United States government, understandably, has deliberately and knowingly decided *not* to raise that argument. It is both forfeited and waived. *See Wood v. Milyard*, 132 S. Ct. 1826, 1832 n.4 (2012); *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004).

Basic principles of constitutional avoidance and circuit precedent direct us not to decide far-reaching constitutional questions that the parties have deliberately and knowingly chosen not to raise. Indeed, we have held that "[t]he grounds for recognizing the forfeiture of arguments are especially strong where the alleged error is constitutional." *Board of County Comm'rs v. Federal Housing Fin. Agency*, 754 F.3d 1025, 1031 (D.C. Cir. 2014) (holding that the need for constitutional avoidance is particularly acute where a party's forfeiture makes deciding the constitutional question neither "necessary nor even advisable"); *see Camreta v. Greene*, 563 U.S. 692, 705 (2011) (A "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.") (internal quotation marks and citations omitted); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring); *Colm v. Vance*, 567 F.2d 1125, 1132 n.11 (D.C. Cir. 1977) (concluding that constitutional "avoidance is especially preferred where the nature of the constitutional issue poses a difficult decision with significant ramifications").

There are few constitutional questions more far-reaching than the proposition that individuals in the United States without legal documentation do not even qualify as "persons" under the Constitution. The Supreme Court has long recognized that immigrants who lack lawful status are protected persons under the Due Process Clause. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (even aliens whose "presence in this country is unlawful, involuntary, or transitory [are] entitled to th[e] constitutional protection" of Fifth and Fourteenth Amendment due process); *Jean v. Nelson*, 472 U.S. 846, 875 (1985) (regardless of immigration status, aliens within the territorial jurisdiction of the United States are "persons" entitled to due process under the Constitution); *cf. Plyler v. Doe*, 457 U.S. 202, 210 (1982) (children of persons here unlawfully are protected "persons" under the Equal Protection Clause of the Fourteenth Amendment).

The implications of amici's argument that J.D. is not a "person" in the eyes of our Constitution is also deeply troubling. If true, then that would mean she and everyone else here without lawful documentation—including everyone under supervision pending immigration proceedings and all Dreamers—have no constitutional right to bodily integrity in any form (absent criminal conviction). They could be forced to have abortions. They could, if raped by government officials who hold them in detention, then be forced to carry any pregnancies to term. Even if pregnancy would kill the

Mother, the Constitution would turn a blind eye. Detainees would have no right to any medical treatment or protection from abuse by other detainees. Those with diabetes or suffering heart attacks could be left to die while their governmental custodian watches.

Fortunately, we need not confront that profoundly unsettling argument because no party has raised or briefed it and, as noted, the government has expressly disavowed advancing it. In an emergency proceeding of this nature, we should be particularly hesitant to decide sweeping questions of constitutional law unnecessarily and without any briefing.

* * * * *

J.D. came to the United States without legal documentation. That is not disputed. But the government cannot make a forced pregnancy the sanction for that action. J.D. retains her basic rights to personhood. After all, this child fled here all alone in a desperate effort to avoid severe abuse. And, unfortunately, other women and girls desperate to escape abuse, sexual trafficking, and forced prostitution undoubtedly will also find themselves on our shores and pregnant. When they, consistent with legal process, decide to continue their pregnancies, that decision should be supported. When they decide that their dire circumstances leave them in no position to carry a pregnancy to term, the Constitution forbids the government from directly or effectively prohibiting their exercise of that right in the manner it has done here.

I accordingly dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5236

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, APPELLEE

v.

ERIC D. HARGAN, ACTING SECRETARY, HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

Filed on: Oct. 24, 2017

On Petition for Rehearing En Banc

ORDER

Before: GARLAND, *Chief Judge*; HENDERSON[***], ROGERS, TATEL, GRIFFITH[***], KAVANAUGH[***], SRINIVASAN, MILLETT[**], PILLARD[*], and WILKINS, *Circuit Judges*

Upon consideration of appellee's petition for rehearing en banc and the supplements thereto, the response to the petition and the supplement to the response, the corrected brief for amici curiae States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Massachusetts, Oregon, Pennsylvania, Vermont, and Washington, and the District of Columbia in support of appellee's petition, and the vote in favor of the petition by a majority of the judges

eligible to participate; and appellee's motion to recall the mandate and petition for en banc consideration of appellee's motion to recall the mandate, it is

ORDERED that the mandate be recalled. The Clerk of the district court is directed to return forthwith the mandate issued October 20, 2017. It is

FURTHER ORDERED that appellee's petition for rehearing en banc be granted. This case has been considered by the court sitting en banc without oral argument, no judge having requested oral argument. It is

FURTHER ORDERED that the order filed October 20, 2017 be vacated, except that the administrative stay remains dissolved. It is

FURTHER ORDERED that appellants' emergency motion for stay pending appeal be denied because appellants have not met the stringent requirements for a stay pending appeal, *see Nken v. Holder*, 556 U.S. 418, 434 (2009), substantially for the reasons set forth in the October 20, 2017 dissenting statement of Circuit Judge Millett.[1] The case is hereby remanded to the district court for further proceedings to amend the effective dates in paragraph 1 of its injunction. The dates in paragraph 1 have now passed, and the parties have proffered new evidence and factual assertions concerning the expected duration of custody and other matters. The district court is best suited to promptly determine

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[1] As both parties agree, the court has jurisdiction over this appeal because the district court's temporary restraining order was more akin to preliminary injunctive relief and is therefore appealable under 28 U.S.C. § 1292(a)(1). *See Sampson v. Murray*, 415 U.S. 61, 86 n.58 (1974).

in the first instance the appropriate dates for compliance with the injunction. In so doing, the district court retains full discretion to conduct proceedings and make any factual findings deemed necessary and appropriate to the district court's exercise of its equitable judgment, consistent with this order, including with regard to any of the factual disputes that were raised for the first time on appeal. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330-31 (2006); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 305 (D.C. Cir. 2006).

The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

* Circuit Judge Pillard did not participate in this matter.

** A statement by Circuit Judge Millett, concurring in the disposition of the case, is attached to this order.

*** A statement by Circuit Judge Henderson, dissenting from the disposition of the case, is attached to this order.

*** A statement by Circuit Judge Kavanaugh, joined by Circuit Judges Henderson and Griffith, dissenting from the disposition of the case, is attached to this order.

MILLETT, *Circuit Judge*, concurring:

While I disagreed with the panel order, I recognize that my colleagues labored hard under extremely pressured conditions to craft a disposition that comported with their considered view of the law's demands.

Fortunately, today's decision rights a grave constitutional wrong by the government. Remember, we are talking about a child here. A child who is alone in a foreign land. A child who, after her arrival here in a search for safety and after the government took her into custody, learned that she is pregnant. J.D. then made a considered decision, presumably in light of her dire circumstances, to terminate that pregnancy. Her capacity to make the decision about what is in her best interests by herself was approved by a Texas court consistent with state law. She did everything that Texas law requires to obtain an abortion. That has been undisputed in this case.

What has also been expressly and deliberately uncontested by the government throughout this litigation is that the Due Process Clause of the Fifth Amendment fully protects J.D.'s right to decide whether to continue or terminate her pregnancy. The government—to its credit—has never argued or even suggested that J.D.'s status as an unaccompanied minor who entered the United States without documentation reduces or eliminates her constitutional right to an abortion in compliance with state law requirements.

Where the government bulldozed over constitutional lines was its position that—accepting J.D.'s constitutional right and accepting her full compliance with Texas law—J.D., an unaccompanied child, *has the burden of extracting herself from custody* if she wants to

exercise the right to an abortion that the government does not dispute she has. The government has insisted that it may categorically blockade exercise of her constitutional right unless this child (like some kind of legal Houdini) figures her own way out of detention by either (i) surrendering any legal right she has to stay in the United States and returning to the abuse from which she fled, or (ii) finding a sponsor—effectively, a foster parent—willing to take custody of her and to not interfere in any practical way with her abortion decision.

That is constitutionally untenable, as the en banc court agrees. Settled precedent from *Planned Parenthood of Scutheastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), establishes that the government may not put substantial and unjustified obstacles in the way of a woman's exercise of her right to an abortion pre-viability. The government, however, has identified no constitutionally sufficient justification for asserting a veto right over J.D. and Texas law.

Judge Kavanaugh's dissenting opinion claims that the court has somehow broken new constitutional ground by authorizing "immediate abortion on demand" by "unlawful immigrant minors" (Judge Kavanaugh's Dissent Op. 1). What new law? It cannot be J.D.'s status as an undocumented immigrant because the government has accepted that her status does not affect her constitutional right to an abortion, as Judge Kavanaugh's opinion acknowledges on the next page (Dissent Op. 2). Accordingly, in this litigation, J.D., like other minors in the United States who satisfy state-approved procedures, is entitled under binding Su-

preme Court precedent to choose to terminate her pregnancy. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979). The court's opinion gives effect to that concession; it does not create a "radical" "new right" (Judge Kavanaugh Dissent Op. 1) by doing so.[1]

Beyond that, it is unclear why undocumented status should change everything. Surely the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for unlawful entry be forcing a child to have a baby. The bedrock protections of the Fifth Amendment's Due Process Clause cannot be that shallow.

Abortion on demand? Hardly. Here is what this case holds: a pregnant minor who (i) has an unquestioned constitutional right to choose a pre-viability abortion, and (ii) has satisfied every requirement of state law to obtain an abortion, need not wait additional weeks just because she—in the government's inimitably ironic phrasing—"refuses to leave" its custody, Appellants' Opp'n to Reh'g Pet. 11. That sure does not sound like "on demand" to me. Unless Judge Kavanaugh's dissenting opinion means the demands of the Constitution and Texas law. With that I would agree.

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[1] Because at no point in its briefing or oral argument in this court or the district court did the government dispute that J.D. has a constitutional right to obtain an abortion, the government has forfeited any argument to the contrary. *See, e.g.*, *Koszola v. FDIC*, 393 F.3d 1294, 1299 n.1 (D.C. Cir. 2005). In fact, at oral argument, government counsel affirmed, in response to a direct question, that the argument was waived in this case. Oral Arg. 17:50; *see, e.g.*, *GSS Group Ltd. v. National Port Auth. of Liberia*, 822 F.3d 598, 608 (D.C. Cir. 2016).

1. Sponsorship

The centerpiece of the panel order (and now Judge Kavanaugh's dissenting opinion at 2-3) was the conclusion that forcing J.D. to continue her pregnancy for multiple more weeks is not an "undue burden" as long as the sponsorship search is undertaken "expeditiously." Panel Order at 1. The panel order then treated its ordered eleven-day delay as just such an expeditious process.

But that starts the clock long after the horses have left the gate. The sponsorship search has already been underway for now-almost *seven weeks*. Throughout all of that time, the government was under a statutory obligation to find a sponsor if one was available. *See* 8 U.S.C. § 1232(c)(2). None materialized. Tacking on another eleven days to an already nearly seven-week sponsorship hunt—that is, enforcing an almost *nine week* delay before J.D. can even start again the process of trying to exercise her right—is the antithesis of expedition. A nine-week waiting period before litigation can start or resume, if adopted by a State, would plainly be unconstitutional. *Cf. Whole Woman's Health*, 136 S. Ct. at 2318 (striking restrictions on abortion providers as unduly burdensome, noting in part "clinics' experiences since the admitting-privileges requirement went into effect of 3-week wait times") (citations omitted).

For very good reason, the sponsorship process is anything but expeditious. The sponsor is much like a foster parent, someone who chooses to house and provide for a child throughout her time in the United States, and who promises to ensure her appearance at all immigration proceedings. To protect these acutely

vulnerable children from trafficking, sexual exploitation, abuse, and neglect, Congress requires the Department of Health and Human Services to be careful in its review and restrictive in who can apply. *See* 8 U.S.C. § 1232. To that end, agency regulations provide that potential sponsors must either be related to J.D. or have some "bona fide social relationship" with the child that "existed before" her arrival in the United States.[2]

On top of that, the panel's order did not say that, at the end of its eleven days, J.D. could terminate her pregnancy if no sponsor were found. Quite the opposite: The order just stopped everything—except, critically, the continuation of J.D.'s pregnancy—until October 31st, at which time J.D. would have to restart the litigation all over again unless a sponsor was lucked upon. There is nothing expeditious about the prolonged and complete barrier to J.D.'s exercise of her right to terminate her pregnancy that the panel order allowed the government to perpetuate.

Nor was any constitutionally sound justification for the order's imposition of eleven more days on top of the already elapsed seven weeks ever advanced by the government. In fact, the government (i) never requested a stay to find a sponsor; (ii) never asked for a remand;

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[2] Office of Refugee Resettlement, Section 2: Safe and Timely Release from ORR Care, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 (last visited Oct. 24, 2017) ("In the absence of sufficient evidence of a *bona fide social relationship* with the child and/or the child's family that existed *before* the child migrated to the United States, the child will *not* be released to that individual.") (emphases added).

(iii) never suggested in briefing or oral argument that there was any prospect of finding a sponsor at all, let alone finding one in the next eleven days or even in the foreseeable future; (iv) never even hinted, since no family member has been approved as a sponsor, that a non-family member could be identified, vetted, and take custody of J.D. within eleven days; and (v) never made any factual or legal argument contending that the already-seven-week-long-and-counting sponsorship process was an "expeditious" process or the type of short-term burden that could plausibly pass muster under Supreme Court precedent to bar an abortion.

All the government argues with respect to sponsorship was that its flat and categorical prohibition of J.D.'s abortion was permissible because she could leave government custody if a sponsor were found or she surrendered any claim of legal right to stay here and voluntarily departed. Oral Arg. 12:35; 24:30-25:15. Custody, the government insists, is the unaccompanied child's problem to solve.

A detained, unaccompanied minor, however, has precious little control over the sponsorship process. The Department of Health and Human Services is statutorily charged with finding, vetting, and approving sponsors. *See* 8 U.S.C. § 1232(c); 6 U.S.C. § 279. So the government's position that J.D. cannot exercise her constitutional right unless the government approves a sponsor imposes a flat prohibition on her reproductive freedom that J.D. has no independent ability to overcome.

Nor does sponsorship bear any logical relationship to J.D.'s decision to terminate the pregnancy. Because J.D. has obtained a judicial bypass order from a Texas

court that allows her to decide for herself whether an abortion is in her own best interests, a sponsor would have no ability to control or influence J.D.'s decision. *See* Texas Family Code § 33.003(i-3). Accordingly, finding a sponsor and allowing J.D. to exercise her unchallenged constitutional right are not mutually exclusive. The two can and should proceed simultaneously.

Judge Kavanaugh's dissenting opinion (at 4) suggests that it would be good to put J.D. "in a better place when deciding whether to have an abortion." That, however, is not any argument the government ever advanced. The only value of sponsorship identified by the government was that sponsorship, like voluntary departure from the United States, would get J.D. and her pregnancy out of the government's hands.

In any event, even if sponsorship, as Judge Kavanaugh supposes, might be more optimal in a policy sense, J.D. has already made her decision, and neither the government nor the dissenting opinion identifies a constitutionally sufficient justification consistent with Supreme Court precedent for requiring J.D. to wait for what may or may not be a better environment. The dissenting opinion further assumes that J.D. is different because she lacks a "support network of friends and family." Judge Kavanaugh's Dissent Op. 5. Unfortunately, the central reason for the bypass process is that pregnant girls and women too often find themselves in dysfunctional and sometimes dangerous situations—such as with sexually or physically abusive parents and spouses—in which those networks have broken down. *See* Texas Family Code § 33.003(i-3) (authorizing bypass when the court finds that "the notification and

attempt to obtain consent would not be in the best interest of the minor[]"). It thus would require a troubling and dramatic rewriting of Supreme Court precedent to make the sufficiency of someone's "network" an added factor in delaying the exercise of reproductive choice even after compliance with all state-mandated procedures.

"Voluntary" departure is not a constitutionally adequate choice either given both the life-threatening abuse that J.D. claims to face upon return, and her potential claims of legal entitlement to remain in the United States. *See* Sealed Decl.; 8 U.S.C. § 1101(a)(27)(J) (special immigrant juvenile status); 8 C.F.R. § 204.11.[3] Notably, while presenting a legal argument that relied heavily on voluntary departure to defend its abortion prohibition, government counsel was unable to confirm at oral argument whether or how voluntary departure actually works for unaccompanied minors over whom the government is exercising custody. *See* Oral Arg. 28:15-28:50; *cf.* 6 U.S.C. § 279(b)(2)(B) (restricting the release of unaccompanied minors on their own recog-

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[3] While the government now objects that J.D. has not previously identified on which statutory basis she would seek relief from removal, Appellants' Opp'n to Reh'g Pet. 5-6, 14, J.D. has argued all along that her exercise of her unchallenged right under the Due Process Clause to an abortion could not be conditioned on her "giv[ing] up her opportunity to be reunited with family here in the United States, or forcing her to return to her home country and abuse." Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 18; *see* Pl.'s Reply in Supp. of Mot. for TRO 6 ("The government should not be allowed to use her constitutional right to access abortion as a bargaining chip to trade for immigration status[.]"). While she had not yet cited to particular statutory provisions, that presumably is because the government has not yet initiated removal proceedings.

nizance). The government has put nothing in the record to suggest that it is in the practice of putting children on airplanes all alone and just shipping them back to abusive and potentially life-endangering situations.

2. Facilitation

The government argues that it need not "facilitate" J.D.'s decision to terminate her pregnancy. But the government is engaged in verbal alchemy. To "facilitate" something means "[t]o make (an action, process, *etc.*) easy or easier; to promote, help forward; to assist in bringing about (a particular end or result)."[4] This case does not ask the government to make things easier for J.D. The government need not pay for J.D.'s abortion; she has that covered (with the assistance of her guardian *ad litem*). The government need not transport her at any stage of the process; J.D. and her guardian *ad litem* have arranged for that. Government officials themselves do not even have to do any paperwork or undertake any other administrative measures. The contractor detaining J.D. has advised that it is willing to handle any necessary logistics, just as it would for medical appointments if J.D. were to continue her pregnancy. The government also admitted at oral argument that, in light of the district court's order, the Department of Health and Human Services does not even need to complete its own self-created internal "best interests" form. *See* Oral Arg. 31:40-33:15. So on the record of this case, the government does not have to facilitate—make easier—J.D.'s termination of her

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[4] *See* OXFORD ENGLISH DICTIONARY ONLINE ("facilitate" def. 1(a)), http://www.oed.com/view/Entry/67460?redirectedFrom=facilitate#eid (last visited Oct. 24, 2017).

pregnancy. It just has to not interfere or make things *harder*.

The government's suggestion of sponsorship as a facilitation-free panacea also overlooks that it would require substantial governmental effort and resources for J.D. to be placed into the hands of a sponsor who must enter into an agreement with the government and is responsible for ensuring the minor's appearance at all immigration proceedings.[5] While after expending all of its resources to find, vet and approve the transfer, the government's ongoing ties to sponsors are presumably less than for a grantee, the government has put no facts in the record or any argument as to why that difference in degree should be constitutionally sufficient. In any event, transferring J.D. into the custody of the guardian *ad litem* to obtain the abortion would require far *less* use of governmental resources and personnel and far less facilitation. The government's desire to have as little to do as possible with J.D.'s exercise of her constitutional right while in custody thus seems erratic.

The government's claim that it does not think that an abortion is in J.D.'s best interests does not work either. The judicial bypass already put that best interests decision in J.D.'s hands. On top of that, the government does not even claim that it is making an individualized "best interests" judgment in forbidding J.D.'s abortion. It is simply supplanting her legally authorized best interests judgment with its own cate-

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[5] *See* Office of Refugee Resettlement, Section 2.8.1: After Care Planning, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 (last visited Oct. 24, 2017).

gorical position against abortion—which is something not even a parent or spouse or State could do. Only the big federal government gets this veto, we are told.

The government unquestionably is fully entitled to have its own view preferring the continuation of pregnancy, and to even require the disclosure of information expressing that view. But the government's mere opposition to J.D.'s decision is not an individualized "best interests" judgment within any legally recognized meaning of that term, and its asserted categorical bar to abortion is without constitutional precedent.

3. Abuse of Discretion Review

In resolving this case, it must be remembered that this case arises on abuse-of-discretion review of a district court's injunctive order. *See, e.g., Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). And the expedition with which the panel and now the en banc court have acted underscores that time is a zero-sum matter in this case. J.D. is already into the second trimester of her pregnancy, which means that, as days slip by, the danger that the delayed abortion procedure poses to her health increases materially. We are told that waiting even another week could increase the risk to J.D.'s health, the potential complexity of the procedure, and the great difficulty of locating an abortion provider in Texas.[6] The sealed declaration filed in this case at-

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[6] Oral Arg. 1:13:45-1:15:10 (Counsel for J.D.: "Texas law requires counseling at least 24 hours in advance of the procedure by the same doctor who is to provide the abortion. Because of the limited availability of doctors to provide abortions in Texas, the same doctor is not always at the facility in south Texas. So, for example, the doctor that provided the counseling yesterday to J.D.

tests that a compelled return to her country at this time would expose her to even more life-threatening physical abuse.

The irreparable injury to J.D. of postponing termination of her pregnancy—the weekly magnification of the risks to her health and the ever-increasing practical barriers to obtaining an abortion in Texas—have never been factually contested by the government. J.D.'s counsel has advised, and the government has not disputed, that she is on the cusp of having to travel hun-

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is there today and on Saturday, but is not the same doctor who is there next week. So next week, there is a different doctor there on Monday and Tuesday, so if J.D. were allowed to have the abortion next week, she would have to be, unless this court declares otherwise, * * * counseled by this different doctor there on Monday and wait 24 hours to have the abortion on Tuesday. * * * [After Tuesday October 24, 2017], we are looking at the following week. The doctor that is there Thursday, Friday and Saturday, the following week * * * [is the doctor that only performs abortions at 15.6 weeks]. And we are very concerned that she is on the cusp, so even if she is able to go next week, she may be past the limit for that particular doctor."); Reh'g Pet. 4-5; Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 3; *see Williams v. Zbaraz*, 442 U.S. 1309, 1314-1315 (1979) (Stevens, J., sitting as Circuit Justice) (evidence of an increased risk of "maternal morbidity and mortality" supports a claim of irreparable injury); Linda A. Bartlett, *et al.*, *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, 103:4 OBSTETRICS & GYNECOLOGY 729 (April 2004) (relative risk from abortion increases 38% each gestational week); Cates, W. Jr, Schulz, K.F., Grimes, D.A., Tyler, C.W. Jr., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, FAMILY PLANNING PERSPECTIVES 1977; 9:266, 273 ("[I]f a woman delays beyond the eighth week up to 10 weeks, the major morbidity rate is 0.36, which is 57 percent higher than her risk at eight or fewer weeks. Similarly, if she delays her abortion procedure until the 11-12-week interval, she increases her relative risk of major morbidity by 91 percent.").

dreds of miles to obtain an abortion. *See* Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 9 (representing that, as of October 19, 2017, depending on which doctor is available, it may be that J.D.'s "only option next week would be to travel hundreds of miles to a more remote clinic"); Reh'g Pet. 5; *supra* note 6. Likewise, at no time before the district court or the panel did the government's briefing or oral argument dispute J.D.'s claim of severe child abuse or ask for fact finding on that claim.

On the other side of the balance, the government asserts only its opposition to an abortion by J.D. as an unaccompanied minor in the custody of a Department of Health and Human Services grantee. That is an acutely selective form of resistance since the government acknowledges it would not apply were J.D. to turn 18 and be moved to Immigration and Customs Enforcement custody or were she a convicted criminal in Bureau of Prisons custody. Oral Arg. 9:20-11:45. Under current governmental policy and regulations, those women are permitted to terminate their pregnancies.[7] Given that dissonance in the government's position, the balancing of interests weighs heavily in J.D.'s favor.

In short, I fully agree with the en banc court's decision to deny the government's motion for a stay and to remand for further expeditious proceedings and any appropriate fact finding, especially in light of the factual disputes surfaced for the first time in the rehearing papers.

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[7] *See* ICE Guidelines, Detention Standard 4.4, Medical Care, available at https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf; 28 C.F.R. § 551.23.

Because J.D.'s right to an abortion under the Due Process Clause is unchallenged and because J.D. has done everything that Texas law requires (and more) to obtain an abortion, the government bore the burden of coming forward with a constitutionally sufficient justification for flatly forbidding termination of her pregnancy. The government's mere hope that an unaccompanied, abused child would make the problem go away for it by either (i) surrendering all of her legal rights and leaving the United States, or (ii) finding a sponsor the government itself could never find is not a remotely constitutionally sufficient reason for depriving J.D. of any control over this most intimate and life-altering decision. The court today correctly recognizes that J.D.'s unchallenged right under the Due Process Clause affords this 17-year-old a modicum of the dignity, sense of self-worth, and control over her own destiny that life seems to have so far denied her.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting: Does an alien minor who attempts to enter the United States eight weeks pregnant—and who is immediately apprehended and then in custody for 36 days between arriving and filing a federal suit—have a constitutional right to an elective abortion? The government has inexplicably and wrongheadedly failed to take a position on that antecedent question. I say wrongheadedly because at least to me the answer is plainly—and easily—no. To conclude otherwise rewards lawlessness and erases the fundamental difference between citizenship and illegal presence in our country.

The en banc Court endorses or at least has no problem with this result. By virtue of my colleagues' decision, a pregnant alien minor who attempts to enter the United States illegally is entitled to an abortion, assuming she complies with state abortion restrictions once she is here. Under my colleagues' decision, the minor need not have "developed substantial connections with this country," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), as the plaintiff here plainly has not. Under my colleagues' decision, the minor need not have "effected an entry into the United States," *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), because the plaintiff here did not, *see id.* (alien "paroled into the United States pending admissibility," without having "gained [a] foothold," has "not effected an entry"). Under my colleagues' decision, it is difficult to imagine an alien minor anywhere in the world who will not have a constitutional right to an abortion in this country. Their action is at odds with Supreme Court precedent. It plows new and potentially dan-

gerous ground. Accordingly, I dissent from the vacatur of the stay pending appeal.

I. BACKGROUND

In or about early July 2017, 17-year-old Jane Doe (J.D.) became pregnant. On or about September 7, 2017, she attempted to enter the United States illegally and unaccompanied. By J.D.'s own admission, authorities detained her "upon arrival." District Court Docket Entry (Dkt. No.) 1-13 at 1. She has since remained in federal custody—in a federally funded shelter—because she is an "unaccompanied alien child." 6 U.S.C. § 279(g)(2) ("unaccompanied alien child" is "a child who," *inter alia*, "has no lawful immigration status in the United States" and "has not attained 18 years of age").

The Office of Refugee Resettlement (ORR) of the United States Department of Health and Human Services (HHS) is responsible for "unaccompanied alien children who are in Federal custody by reason of their immigration status." 6 U.S.C § 279(b)(1)(A). In March 2008, HHS announced a "[p]olicy" that "[s]erious medical services, including . . . abortions, . . . require heightened ORR involvement." HHS, *Medical Services Requiring Heightened ORR Involvement* (Mar. 21, 2008), perma.cc/LDN8-JNL5. In March 2017, consistent with that policy, ORR further announced that shelter personnel "are prohibited from taking any action that facilitates an abortion without direction and approval from the Director of ORR." Dkt. No. 3-5 at 2.

According to the declaration of an ORR official, J.D. was physically examined while in custody and "was informed that she [is] pregnant." Dkt. No. 10-1 at 2.

J.D.'s counsel interprets the declaration to say that "J.D. did not learn that she was pregnant until after her arrival in the United States." Pl.'s Opp. to Defs.' Emergency Mot. for Stay Pending Appeal (Opp.) 22-23; *see also* Panel Dissent of Millett, J. (Panel Dissent) 2 ("After entering the United States, [J.D.] . . . learned that she is pregnant."). But the declaration does not rule out that J.D. knew she was pregnant even before the examination. Nor has J.D. herself alleged that she first learned of her pregnancy in this country. *See generally* Dkt. No. 1-13 at 1 (J.D.'s declaration in support of complaint). And it is highly likely she knew when she attempted to enter the United States that she was pregnant, as she was at least eight weeks pregnant at the time.[1] Notably, elective abortion is illegal in J.D.'s home country. Oral Arg. Recording 29:19-29:34.

J.D. requested an abortion. The evidence before us is that it is an elective abortion: nothing indicates it is necessary to preserve J.D.'s health.[2] J.D.'s request was relayed to the ORR Director, who denied it. On October 13, 2017—having spent a mere 36 days in the United States, all of them in custody—J.D. filed suit in district court, enlisting this country's courts to vindicate (*inter alia*) her alleged Fifth Amendment right to an abortion. The next day, she applied for a

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[1] A recent declaration filed under seal by J.D.'s attorney ad litem provides further circumstantial evidence that J.D. left her home country because of her pregnancy. Cortez Decl. ¶ 8.

[2] At oral argument, HHS stated its policy is that an emergency abortion, which it interprets to include a "medically necessary" abortion, would be allowed. Oral Arg. Recording 20:00-20:27.

temporary restraining order (TRO) and moved for a preliminary injunction.

The government opposed J.D.'s application and motion. For reasons known only to the government, it did not take a position on whether J.D.—as an alien who attempted to enter the United States illegally and who has no substantial connections with this country—has any constitutional right to an abortion. Instead the government argued that ORR has placed no "undue burden" on the alleged right. Dkt. No. 10 at 11-16 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). At the TRO hearing, the district court repeatedly pressed the government about whether J.D. has a constitutional right to an abortion. The government emphasized that it was "not taking a . . . position" but was "not going to give [the court] a concession" either. Opp., Supplement 14.

The district court issued a TRO requiring that the government allow J.D. to be transported to an abortion provider for performance of the procedure. The government appealed the TRO to this Court and sought a stay pending appeal. At oral argument, the government repeatedly stated that it takes no position on whether J.D. has a constitutional right to an abortion, Oral Arg. Recording 8:10-8:46, 16:43-17:12, and that it instead "assume[s] for the purposes of . . . argument" that she has such a right, Oral Arg. Recording 17:27-17:52.[3]

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[3] Under insistent pressure to state whether the government was "waiving" the issue, counsel for the government said yes in the heat of the moment. Oral Arg. Recording 17:41-17:52. But the next moment, when reminded of the difference between forfeiture and waiver—a distinction that lawyers often overlook or misunder-

On October 20, 2017, over a dissent, a motions panel of this Court issued an order directing the district court to allow HHS until close of business October 31 to find a suitable sponsor to take custody of J.D. so that HHS can release her from its custody. Without deciding whether J.D. has a constitutional right to an abortion, the panel concluded that a short delay to secure a sponsor does not unduly burden any alleged right if the process is expeditiously completed by close of business October 31.

On October 22, 2017, J.D. filed a petition for rehearing en banc. Today, the Court grants the petition, vacates the panel's October 20 order and denies the government's motion for stay pending appeal "substantially for the reasons set forth in" the panel dissent.

II. ANALYSIS

As I noted at the outset, the en banc Court's decision in effect means that a pregnant alien minor who attempts to enter the United States illegally is entitled to an abortion, assuming she complies with state abortion restrictions once she is here. Although the government has for some reason failed to dispute that proposition, it is not the law.

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stand, *cf. Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) (even "jurists often use the words interchangeably")—counsel effectively retracted the foregoing statement, saying she was "not authorized to take a position" on whether J.D. has a constitutional right to an abortion, Oral Arg. Recording 17:52-18:51.

A. We Can And Must Decide The Antecedent Question Of Whether J.D. Has A Constitutional Right To An Abortion.

The Supreme Court has held that if a party "fail[s] to identify and brief" "an issue 'antecedent to . . . and ultimately dispositive of' the dispute," an appellate court may consider the issue *sua sponte*. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *cf. United States v. Bowie*, 198 F.3d 905, 913 (D.C. Cir. 1999) ("We are never bound to accept the government's confession of error" (citing *Young v. United States*, 315 U.S. 257, 258 (1942), *United States v. Pryce*, 938 F.2d 1343, 1351-52 (D.C. Cir. 1991) (Randolph, J., concurring))). Here, the question of whether J.D. has a constitutional right to an abortion is "antecedent to" any issue of undue burden. And the antecedent question is "dispositive of" J.D.'s Fifth Amendment claim, at least now that my colleagues have reinstated the TRO on the apparent theory that the claim is likely meritorious. Accordingly, we can and should expressly decide the antecedent question.

True, we should not ordinarily confront a broad constitutional question "if there is also present some other ground upon which the case may be disposed of," *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), including if the alternative is a "narrower" constitutional ground, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999).[4]

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[4] We cannot duck a broad constitutional question if the alternative ground is not "an adequate basis for decision." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184. At the panel stage, the possibility of expeditious sponsorship was an adequate narrower

But in the analogous context of qualified immunity, we are "permitted . . . to avoid avoidance—that is, to determine whether a right exists before examining" the narrower question of whether the right "was clearly established" at the time an official acted. *Camreta v. Greene*, 563 U.S. 692, 706 (2011). Our discretion in that area rests on the recognition that it "is sometimes beneficial to clarify the legal standards governing public officials." *Id.* at 707. The same interest is, to put it mildly, implicated here. Border authorities, immigration officials and HHS itself would be well served to know ex ante whether pregnant alien minors who come to the United States in search of an abortion are constitutionally entitled to one. And under today's decision, pregnant alien minors the world around seeking elective abortions will be on notice that they should make the trip.[5]

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basis for our decision to briefly *delay* J.D.'s abortion. By contrast, today's result—which has the real-world effect of *entitling* J.D. to an abortion—is difficult to explain unless it rests at least in part on the proposition that J.D. has a constitutional right to an abortion. Even if I were to assume, without in any way conceding, that J.D. had such a constitutional right, I would nonetheless stand by the panel order.

[5] The panel dissent paid lip service to constitutional avoidance, Panel Dissent 8, before sweepingly declaring that when alien minors "find themselves on our shores and pregnant" and seeking an abortion, "the *Constitution* forbids the government from directly or effectively prohibiting their exercise of that *right* in the manner it has done here." Panel Dissent 9-10 (emphases added). That is not judicial modesty.

Granted, because of the government's failure to take a position,[6] we in theory have discretion *not* to decide the antecedent question. But in reality the ship has sailed: as a result of my colleagues' decision, J.D. will soon be on her way to an abortion procedure she would not receive absent her invocation of the Fifth Amendment. If ever there were a case in which the public interest compels us to exercise our "independent power to identify and apply the proper construction of governing law" irrespective of a party's litigating position, *U.S. Nat'l Bank of Or.*, 508 U.S. at 446 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)), this is it. The stakes, both in the short run and the long, could scarcely be higher.

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[6] I could not disagree more strongly with Judge Millett's characterization of the government's position on the merits—i.e., that it outright "waived" any contention that J.D. has no constitutional right to an abortion. Millett Concurrence 2-3 n.1. She must have read different papers and listened to a different argument from the ones I read and listened to. A waived argument "is one that a party has knowingly and intelligently relinquished." *Wood v. Milyard*, 132 S. Ct. 1826, 1832 n.4 (2012). The government has declared time and again that it is not taking a position on whether J.D. has a constitutional right to an abortion. That is not waiver. Government counsel in the district court stated that he was neither raising nor conceding the point. That is not waiver. Government counsel in this Court stated that she lacked authority to take a position. That, too, is not waiver: counsel who disclaims such authority cannot relinquish an argument any more than she can advance one. All this is beside the point, however, because of our independent duty to declare the law. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 446.

B. J.D. Has No Constitutional Right To An Abortion.

J.D. is not a U.S. citizen. She is not a permanent resident, legal or otherwise. According to the record, she has no connection to the United States, let alone "substantial" connections. Despite her physical presence in the United States, J.D. has never entered the United States as a matter of law and cannot avail herself of the constitutional rights afforded those legally within our borders. Accordingly, under a correct interpretation of the law, J.D. has virtually no likelihood of success on the merits and the TRO issued by the district court should remain stayed. *See Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (preliminary injunctive relief unavailable if the plaintiff cannot establish a likelihood of success on the merits).

"The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Thus a young girl detained at Ellis Island for a year, and then released to live with her father in the United States for nearly a decade, "was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). Even after she was no longer detained, "[s]he was still in theory of law at the boundary line and had gained no foothold in the United States." *Id.* Nearly six decades ago the Supreme Court had already said that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United

States." *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

Aliens who have entered the United States—even if illegally—enjoy "additional rights and privileges not extended to those . . . who are merely 'on the threshold of initial entry.'" *Id.* at 187 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Until then—before developing the "substantial connections" that constitute "entry" for an illegally present alien—"[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

We have repeatedly recognized this principle, as have our sister circuits and, most important, as has the Supreme Court. *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment); *Demore v. Kim*, 538 U.S. 510, 546 (2003); *Shaughnessy*, 345 U.S. at 215; *Kaplan*, 267 U.S. at 230; *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (alien petitioner, "although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate"); *Kiyemba v. Obama*, 555 F.3d 1022, 1036-37 n.6 (D.C. Cir. 2009) (Rogers, J., concurring in the judgment) (quoting *Mezei*, *Leng May Ma* and *Ju Toy* in support of proposition that habeas court can order detainee brought within U.S. territory without thereby effecting detainee's "entry" for any other pur-

pose), *vacated on other grounds*, 559 U.S. 131 (2010); *Ukrainian-Am. Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374, 1383 (D.C. Cir. 1990) (Sentelle, J., concurring) (summarizing the entry doctrine).[7] Because she has never entered the United States, J.D. is not entitled to the due process protections of the Fifth Amendment. *See Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) ("As an unadmitted alien present in the United States,

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[7] *See also Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003); *Nwozuzu v. Holder*, 726 F.3d 323, 330 n.6 (2d Cir. 2013) (discussing *Kaplan*); *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954) ("in a literal and physical sense a person coming from abroad enters the United States whenever he reaches any land, water or air space within the territorial limits of this nation" but "those who have come from abroad directly to [an inspection] station seeking admission in regular course have not been viewed by the courts as accomplishing an 'entry' by crossing the national boundary in transit or even by arrival at a port so long as they are detained there pending formal disposition of their requests for admission"); *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) ("the crime of illegal entry inherently carries this additional aspect that leaves an illegal alien's status substantially unprotected by the Constitution in many respects"); *Gonzalez v. Holder*, 771 F.3d 238, 245 (5th Cir. 2014) (alien who entered the United States illegally at age seven and remained for the next 17 years was, under *Kaplan*, deportable and ineligible for derivative citizenship despite his father's intervening naturalization); *Vitale v. INS*, 463 F.2d 579, 582 (7th Cir. 1972) (paroled alien "did not effect an entry into the United States"); *Montgomery v. Ffrench*, 299 F.2d 730, 733 (8th Cir. 1962) (discussing *Kaplan*); *United States v. Argueta-Rosales*, 819 F.3d 1149, 1158 (9th Cir. 2016) ("for immigration purposes, 'entry' is a term of art requiring not only physical presence in the United States but also freedom from official restraint"); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1286, 1288 (11th Cir. 1991) (reversing conviction of alien "found in" the United States illegally because alien never "entered" the United States in the sense of *Kaplan* and *Leng May Ma*).

Albathani's due process rights are limited"). This is, or should be, clear from the controlling and persuasive authorities marshaled above, which are only a fraction of the whole.

Even if J.D. did enjoy the protections of the Due Process Clause, however, due process is not an "all or nothing" entitlement. In some cases "[i]nformal procedures will suffice," *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); "consideration of what procedures due process may require" turns on "the precise nature of the government function" and the private interest. *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). What the Congress and the President have legitimately deemed appropriate for aliens "on the threshold" of our territory, the judiciary may not contravene. "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter. . . . As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, *are due process of law.*" *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (emphasis added). There is a "class of cases" in which "the acts of executive officers, done under the authority of congress, [are] conclusive." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 284 (1855). Among that class of cases are those brought by aliens abroad, including those who are "abroad" under the entry doctrine. *See Din*, 135 S. Ct. at 2139-40 (Kennedy, J., concurring in the judgment); *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972).

Mandel teaches that the Congress's "plenary power" over immigration requires the courts to strike a balance between private and public interests different from the due process that typically obtains. The Supreme Court "without exception has sustained" the Congress's power to exclude aliens, a power "inherent in sovereignty," consistent with "ancient principles" of international law and "to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765-66. Indeed, "over no conceivable subject is the legislative power of Congress more complete." *Id.* at 766 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)) (alteration omitted). The Congress's power to exclude includes the power "to prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." *Id.* (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)). Whatever the merits of different applications of due process "were we writing on a clean slate," "the slate is not clean." *Id.* (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)). We must therefore yield to the Executive, exercising the power lawfully delegated to him, when he "exercises this power negatively on the basis of a facially legitimate and bona fide reason." *Id.* at 770. Moreover, this deference is required even when the constitutional rights of U.S. citizens are affected: we may not "look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of *citizens* "who seek personal communication with" the excluded alien. *Id.* Thus in *Mandel*, the Executive permissibly prohibited an alien communist intellectual

to travel to the United States, where he had been scheduled to speak at several universities.

Applying *Mandel*, the Supreme Court recently approved the Executive's denial of entry to an Afghan man whose U.S.-citizen wife was waiting for him in this country. *Din*, 135 S. Ct. at 2131 (plurality opinion). The Court in *Din* was divided not only over whether the wife had any due process interest in her husband's attempt to immigrate but also over whether that hypothetical interest had been infringed. *Compare id.* (plurality opinion) (three justices concluding that there is no due process right "to live together with [one's] spouse in America"), *with id.* at 2139 (Kennedy, J., concurring in the judgment) (two justices concluding that, even if such a right exists, the Government's visa-denial notice is all that due process can require). Citing *Mandel*, Justice Kennedy reasoned that the government's action in *Din* was valid, even though it "burden[ed] a citizen's own constitutional rights," because it was made "on the basis of a facially legitimate and bona fide reason." *Id.* at 2139 (Kennedy, J., concurring in the judgment) (quoting *Mandel*, 408 U.S. at 770).[8] Justice Scalia, writing for himself, the Chief Justice and Justice Thomas, criticized the dissent's endorsement of the novel substantive due process right asserted by the plaintiff, which he characterized as, "in any world other than the artificial world of ever-expanding constitutional rights, nothing more than a deprivation of her spouse's freedom to immigrate into America." *Id.* at 2131 (plurality opinion).

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[8] Justice Kennedy's opinion in *Din*, because it is narrower than the plurality opinion, is controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Mandel applies with all the more force here, where a substantive due process right is asserted not by a U.S. citizen, nor by a lawful-permanent-resident alien, nor even by an *illegally* resident alien, but by an alien minor apprehended attempting to cross the border illegally and thereafter detained by the federal government. If J.D. can be detained indefinitely—which she can be, *see Zadvydas*, 533 U.S. at 693 (distinguishing *Shaughnessy*, 345 U.S. 206)—and if she can be returned to her home country to prevent her from engaging in disfavored political speech in this country—which she can be, *Mandel*, 408 U.S. at 770—and if she can be paroled into the United States for a decade or more, *Kaplan*, 267 U.S. at 230, register for the draft, *Ng Lin Chong v. McGrath*, 202 F.2d 316, 317 (D.C. Cir. 1952), and see her parents naturalized, *Gonzalez v. Holder*, 771 F.3d 238, 239 (5th Cir. 2014), only for her *still* to be deported with cursory notice, 8 U.S.C. § 1225 —then she cannot successfully assert a due process right to an elective abortion.

In concluding otherwise, the Court elevates the right to elective abortion above every other constitutional entitlement. Freedom of expression, *Mandel*, 408 U.S. at 770, freedom of association, *Galvan*, 347 U.S. at 523, freedom to keep and bear arms, *United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012), freedom from warrantless search, *Verdugo-Urquidez*, 494 U.S. at 274-75, and freedom from trial without jury, *Johnson v. Eisentrager*, 339 U.S. 763, 784-85 (1950) all must yield to the "plenary authority" of the Congress and the Executive, acting in concert, to regulate immigration;

but the freedom to terminate one's pregnancy is more fundamental than them all? This is not the law.[9]

The panel dissent warned of outlandish scenarios that will follow from staying the TRO,[10] Panel Dissent

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[9] The panel dissent simply assumed that the Supreme Court's abortion decisions involving U.S. citizen women—from *Roe v. Wade* to *Whole Woman's Health*—apply *mutatis mutandis* to illegal alien minors. There is no legal analysis to support this assumption, *see generally* Panel Dissent 3-6, which is untenable for the reasons I have described. Judge Millett's subsequent opinion concurring in the Court's en banc disposition does nothing to address that deficit, offering scarce authority to support its assertion of the thwarting of a "grave constitutional wrong" by the government and none that addresses the antecedent constitutional question, which the Court must decide but which Judge Millett dismisses as waived. Millett Concurrence 2-3 n.1.

I cannot improve on the Chief Justice's criticism of the "false premise" that

> our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that "[i]f it is not necessary to decide more, it is necessary not to decide more," sometimes it *is* necessary to decide more. There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them."

Citizens United v. FEC, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) (quoting *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.)).

[10] My colleague's characterization of this case, *see, e.g.*, Millett Concurrence 13, gives it an undeservedly melodramatic flavor—and indeed, from the record, especially the sealed affidavit of ORR's Jonathan White, is contrary to fact. Sealed Supp. to Defs.'

9, but a stay maintains the legal status quo. The United States remains a signatory to the U.N. Convention Against Torture; our law imposes civil liability on government agents who commit torts and criminal liability on those who commit crimes; and counsel have access to detained alien minors, as have J.D.'s counsel. The Constitution does not, and need not, answer every question but diabetics, rape victims and women whose pregnancies threaten their lives are nevertheless provided for. *Contra* Panel Dissent 9.

Although the panel dissent found "deeply troubling" the argument "that J.D. is not a person in the eyes of our Constitution," the argument is nevertheless correct.[11] The panel dissent's contrary conclusion is based on a misunderstanding of the Supreme Court's immigration due process decisions, including a mistaken reliance on the dissent in *Jean v. Nelson*, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting). Writing for the Court in *Jean*, then-Justice Rehnquist expressly declined to opine on the alien plaintiffs' due process rights, *see id.* at 857 (majority opinion), much less to hold—as Justice Marshall would have done—that "regardless of immigration status, aliens within the territorial jurisdiction of the United States are 'persons'

Resp. to Pl.'s Pet. for Reh'g En Banc (Oct. 23, 2017). J.D. may be sympathetic. But even the sympathetic are bound by longstanding law.

[11] J.D.'s "personhood" has nothing to do with it. "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans." *Eisentrager*, 339 U.S. at 783. No one suggests that members of the military—or here, J.D.—are thereby not "persons."

entitled to due process under the Constitution." The Supreme Court has never so held.[12] *Contra* Panel Dissent 9.

It is the panel dissent's (and now the Court's) position that will unsettle the law, potentially to dangerous effect. Having discarded centuries of precedent and policy, the majority offers no limiting principle to constrain this Court or any other from following today's decision to its logical end. If the Due Process Clause applies to J.D. with full force, there will be no reason she cannot donate to political campaigns, despite 52 U.S.C. § 30121's prohibition on contributions by nonresident foreign nationals inasmuch as freedom of political expression is plainly fundamental to our system of ordered liberty. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010). I see no reason that she may not possess a firearm, notwithstanding 18 U.S.C. § 922(g)(5)'s prohibition on doing so while "illegally or unlawfully in the United States," *see Carpio-Leon*, 701 F.3d at 975, inasmuch as "the Second Amendment conferred an individual right to keep and bear arms," *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), in recognition of the "basic right" of self-defense,

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[12] The panel dissent's handling of *Zadvydas v. Davis* also merits clarification. *See* Panel Dissent 9. *Zadvydas* is careful to distinguish "an alien who has *effected an entry* into the United States and one who has never entered" and restates *Kaplan*'s holding that "despite nine years' presence in the United States, an 'excluded' alien 'was still in theory of law at the boundary line and had gained no foothold in the United States'" only three sentences before observing, in the passage quoted by the panel dissent, that "once an alien *enters* the country, the legal circumstance changes." *Zadvydas*, 533 U.S. at 693 (emphasis added). *Zadvydas* uses "entry" in its technical sense.

McDonald v. City of Chicago, 561 U.S. 742, 767 (2010). Even the government's ability to try accused war criminals before U.S. military commissions in theater must be reconsidered as it is premised on the Fifth Amendment's territoriality requirement, which today, by vacating the stay, the Court has so summarily eroded. *See Eisentrager*, 339 U.S. at 784-85.

Heedless of the entry doctrine, its extensive pedigree in our own precedent and its controlling effect in this case, the Court today assumes away the question of what (if any) process is due J.D. and proceeds to a maximalist application of some of the most controverted case law in American jurisprudence. It does so over the well-founded objections of an Executive authorized to pursue its legitimate interest in protecting fetal life. *See Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("the government has a legitimate and substantial interest in preserving and promoting fetal life"); *Casey*, 505 U.S. at 853 (recognizing States' "legitimate interests in protecting prenatal life"); *Roe v. Wade*, 410 U.S. 113, 150 (1973) (recognizing "the State's interest—some phrase it in terms of duty—in protecting prenatal life"). Far from faithfully applying the Supreme Court's abortion cases, this result contradicts them, along with a host of immigration and due-process cases the Court declines even to acknowledge. *Garza v. Hargan* today takes its place in the pantheon of abortion-exceptionalism cases.

Accordingly, I respectfully dissent.

KAVANAUGH, *Circuit Judge*, with whom *Circuit Judges* HENDERSON and GRIFFITH join, dissenting:

The en banc majority has badly erred in this case.

The three-judge panel held that the U.S. Government, when holding a pregnant unlawful immigrant minor in custody, may seek to expeditiously transfer the minor to an immigration sponsor before the minor makes the decision to obtain an abortion. That ruling followed from the Supreme Court's many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion. The Supreme Court has repeatedly held that the Government may further those interests so long as it does not impose an undue burden on a woman seeking an abortion.

Today's majority decision, by contrast, "substantially" adopts the panel dissent and is ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision. The majority's decision represents a radical extension of the Supreme Court's abortion jurisprudence. It is in line with dissents over the years by Justices Brennan, Marshall, and Blackmun, not with the many majority opinions of the Supreme Court that have repeatedly upheld reasonable regulations that do not

impose an undue burden on the abortion right recognized by the Supreme Court in *Roe v. Wade*.[1]

To review: Jane Doe is 17 years old. She is a foreign citizen. Last month, she was detained shortly after she illegally crossed the border into Texas. She is now in a U.S. Government detention facility in Texas for unlawful immigrant minors. She is 15-weeks pregnant and wants to have an abortion. Her home country does not allow elective abortions.

All parties to this case recognize *Roe v. Wade* and *Planned Parenthood v. Casey* as precedents we must follow. All parties have assumed for purposes of this case, moreover, that Jane Doe has a right under Supreme Court precedent to obtain an abortion in the United States. One question before the en banc Court at this point is whether the U.S. Government may expeditiously transfer Jane Doe to an immigration sponsor before she makes the decision to have an abortion. Is that an undue burden on the abortion right, or not?

Contrary to a statement in the petition for rehearing en banc, the three-judge panel's order did not avoid

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[1] The majority's decision rules against the Government "substantially for the reasons set forth in" the panel dissent. Given this ambiguity, the precedential value of this order for future cases will be debated. But for present purposes, we have no choice but to assume that the majority agrees with and adopts the main reasoning for the panel dissent. Otherwise, the majority would have no explanation for the extraordinary step it is taking today. For accuracy, I therefore use the word "majority" when describing the main points of the panel dissent. (If any members of the majority disagreed with any of the main points of the panel dissent, they were of course free to say as much.)

that question. The panel confronted and resolved that question.

First, the Government has assumed, presumably based on its reading of Supreme Court precedent, that an unlawful immigrant minor such as Jane Doe who is in Government custody has a right to an abortion. The Government has also expressly assumed, again presumably based on its reading of Supreme Court precedent, that the Government lacks authority to block Jane Doe from obtaining an abortion. For purposes of this case, all parties have assumed, in other words, that unlawful immigrant minors such as Jane Doe have a right under Supreme Court precedent to obtain an abortion in the United States.

Second, under Supreme Court precedent in analogous contexts, it is not an undue burden for the U.S. Government to transfer an unlawful immigrant minor to an immigration sponsor before she has an abortion, so long as the transfer is expeditious.

For minors such as Jane Doe who are in U.S. Government custody, the Government has stated that it will not provide, pay for, or otherwise facilitate the abortion but will transfer custody of the minor to a sponsor pursuant to the regular immigration sponsor program. Under the regular immigration sponsor program, an unlawful immigrant minor leaves Government custody and ordinarily goes to live with or near a sponsor. The sponsor often is a family member, relative, friend, or acquaintance. Once Jane Doe is transferred to a sponsor in this case, the Government accepts that Jane Doe, in consultation with her sponsor

if she so chooses, will be able to decide to carry to term or to have an abortion.[2]

The panel order had to make a decision about how "expeditious" the transfer had to be. Given the emergency posture in which this case has arisen, the panel order prudently did not purport to define "expeditious" for all future cases. But the panel order set a date of October 31—which is 7 days from now—by which the transfer had to occur. For future cases, the term "expeditious" presumably would entail some combination of (i) expeditious from the time the Government learns of the pregnant minor's desire to have an abortion and (ii) expeditious in the sense that the transfer to the sponsor does not occur too late in the pregnancy for a safe abortion to occur.[3] In this case, although the process by which the case has arrived here has been marked by understandable confusion over the law and by litigation filed by plaintiff in multiple forums, the panel order concluded that a transfer by October 31 —which is 7 days from now—was permissibly expeditious. This would entail transfer in week 16 or 17 of Jane Doe's pregnancy, and the Government agrees that she could have the abortion immediately after transfer, if she wishes.

Third, what happens, however, if a sponsor is not found by October 31 in this case? What happens generally if transfer to a sponsor does not occur expedi-

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[2] The minor of course also has to satisfy whatever state-law requirements are imposed on the decision to obtain an abortion.

[3] To be clear, under Supreme Court precedent, the Government cannot use the transfer process as some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur.

tiously? To begin with, a declaration we just received from the Government states: "while difficult, it is possible to complete a sponsorship process for J.D. by 5 P.M. Eastern on October 31, 2017." The declaration also lists several ongoing efforts regarding the sponsorship process. The declaration adds that all components of the U.S. Government "are willing to assist in helping expedite the process."

But if transfer does not work, given existing Supreme Court precedent and the position the Government has so far advanced in this litigation, it could turn out that the Government will be required by existing Supreme Court precedent to allow the abortion, even though the minor at that point would still be residing in a U.S. Government detention facility. If so, the Government would be in a similar position as it is in with adult women prisoners in federal prison and with adult women unlawful immigrants in U.S. Government custody. The U.S. Government allows women in those circumstances to obtain an abortion. In any event, we can immediately consider any additional arguments from the Government if and when transfer to a sponsor is unsuccessful.

In sum, under the Government's arguments in this case and the Supreme Court's precedents, the unlawful immigrant minor is assumed to have a right under precedent to an abortion; the Government may seek to expeditiously transfer the minor to a sponsor before the abortion occurs; and if no sponsor is expeditiously located, then it could turn out that the Government will be required by existing Supreme Court precedent to allow the abortion, depending on what arguments the Government can make at that point. These rules re-

sulting from the panel order are consistent with and dictated by Supreme Court precedent.

The three-judge panel reached a careful decision that prudently accommodated the competing interests of the parties.

By contrast, under the panel dissent, which is "substantially" adopted by the majority today, the Government has to *immediately* allow the abortion upon the request of an unlawful immigrant minor in its custody, and cannot take time to first seek to expeditiously transfer the minor to an immigrant sponsor before the abortion occurs.[4]

The majority seems to think that the United States has no good reason to want to transfer an unlawful immigrant minor to an immigration sponsor before the minor has an abortion. But consider the circumstances here. The minor is alone and without family or friends. She is in a U.S. Government detention facility in a country that, for her, is foreign. She is 17 years old. She is pregnant and has to make a major life decision. Is it really absurd for the United States to think that the minor should be transferred to her immigration sponsor—ordinarily a family member, rel-

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[4] The majority's order denies the Government's emergency motion for stay pending appeal and thus does not disturb the District Judge's injunction (with adjusted dates), which required the Government to facilitate an immediate abortion for Jane Doe. Therefore, unless the Government can somehow convince the District Judge to suddenly reconsider her decision, which is extremely unlikely given the District Judge's prior ruling on this matter, the majority's order today necessarily means that the Government must allow an immediate abortion while Jane Doe remains in Government custody.

ative, or friend—before she makes that decision? And keep in mind that the Government is not forcing the minor to talk to the sponsor about the decision, or to obtain consent. It is merely seeking to place the minor in a better place when deciding whether to have an abortion. I suppose people can debate as a matter of policy whether this is always a good idea. But unconstitutional? That is far-fetched. After all, the Supreme Court has repeatedly said that the Government has permissible interests in favoring fetal life, protecting the best interests of the minor, and not facilitating abortion, so long as the Government does not impose an undue burden on the abortion decision.

It is important to stress, moreover, that this case involves a minor. We are not dealing with adults, although the majority's rhetoric speaks as if Jane Doe were an adult. The law does not always treat minors in the same way as adults, as the Supreme Court has repeatedly emphasized in the abortion context.

The majority points out that, in States such as Texas, the minor will have received a judicial bypass. That is true, but is irrelevant to the current situation. The judicial bypass confirms that the minor is capable of making a decision. For most teenagers under 18, of course, they are living in the State in question and have a support network of friends and family to rely on, if they choose, to support them through the decision and its aftermath, even if the minor does not want to inform her parents or her parents do not consent. For a foreign minor in custody, there is no such support network. It surely seems reasonable for the United States to think that transfer to a sponsor would be better than forcing the minor to make the decision in an isolated

detention camp with no support network available. Again, that may be debatable as a matter of policy. But unconstitutional? I do not think so.

The majority apparently thinks that the Government must allow unlawful immigrant minors to have an immediate abortion on demand. Under this vision of the Constitution, the Government may not seek to first expeditiously transfer the minor to the custody of an immigration sponsor before she has an abortion.[5] The majority's approach is radically inconsistent with 40 years of Supreme Court precedent. The Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes. These include parental consent laws, parental notice laws, informed consent laws, and waiting periods, among other regulations. Those laws, of course, may have the effect of delaying an abortion. Indeed, parental consent laws in practice can occasion real-world delays of several weeks for the minor to decide whether to seek her parents' consent and then either to obtain that consent or instead to seek a judicial bypass. Still, the Supreme Court has upheld those laws, over vociferous dissents. *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 532 (1990) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting) ("Ohio's judicial-bypass procedure can consume up to

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[5] The precedential value of the majority's decision for future cases is unclear and no doubt will be the subject of debate. But one limit appears clear and warrants mention: The majority's decision requires the Government to allow the abortion even while the minor is residing in Government custody, but it does not require the Government to pay for the abortion procedure itself. The Government's policy on that issue remains undisturbed.

three weeks of a young woman's pregnancy.") (citation omitted); *Hodgson v. Minnesota*, 497 U.S. 417, 465 (1990) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) ("[T]he prospect of having to notify a parent causes many young women to delay their abortions . . . ."); *H.L. v. Matheson*, 450 U.S. 398, 439 (1981) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) ("[T]he threat of parental notice may cause some minor women to delay past the first trimester of pregnancy . . . .").

To be sure, this case presents a new situation not yet directly confronted by the Supreme Court. But that happens all the time. When it does, our job as lower court judges is to apply the precedents and principles articulated in Supreme Court decisions to the new situations. Here, as I see it and the panel saw it, the situation of a pregnant unlawful immigrant minor in a U.S. Government detention facility is a situation where the Government may reasonably seek to expeditiously transfer the minor to a sponsor before she has an abortion.

It is undoubtedly the case that many Americans—including many Justices and judges—disagree with one or another aspect of the Supreme Court's abortion jurisprudence. From one perspective, some disagree with cases that allow the Government to refuse to fund abortions and that allow the Government to impose regulations such as parental consent, informed consent, and waiting periods. That was certainly the position of Justices Brennan, Marshall, and Blackmun in many cases. From the other perspective, some disagree with cases holding that the U.S. Constitution provides a right to an abortion.

As a lower court, our job is to follow the law as it is, not as we might wish it to be. The three-judge panel here did that to the best of its ability, holding true to the balance struck by the Supreme Court. The en banc majority, by contrast, reflects a philosophy that unlawful immigrant minors have a right to immediate abortion on demand, not to be interfered with even by Government efforts to help minors navigate what is undeniably a difficult situation by expeditiously transferring them to their sponsors. The majority's decision is inconsistent with the precedents and principles of the Supreme Court—for example, the many cases upholding parental consent laws—allowing the Government to impose reasonable regulations so long as they do not unduly burden the right to abortion that the Court has recognized.

This is a novel and highly fraught case. The case came to us in an emergency posture. The panel reached a careful decision in a day's time that, in my view, was correct as a legal matter and sound as a prudential matter. I regret the en banc Court's decision and many aspects of how the en banc Court has handled this case.[6]

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[6] The Court never should have reheard this case en banc in the first place. As the Supreme Court has instructed, "En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960). Federal Rule 35 provides that rehearing en banc is reserved for cases that involve "a question of exceptional importance." This Court's judges have adhered to that principle, even while entertaining doubts about a panel's application of the law to individual litigants. Here,

I respectfully dissent.

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on the law, the three-judge panel's order was unpublished; therefore, it constituted no legal precedent for future cases. As to the facts of this one case, if the panel's order had blocked Jane Doe from obtaining an abortion, the en banc consideration might be different. If the panel's order had forced Jane Doe to the cusp of Texas's 20-week abortion cutoff, the en banc consideration might be different. If the panel's order had significantly delayed Jane Doe's decision, the en banc consideration might be different.

But the panel's order did none of those things. The panel was faced with an emergency motion involving an under-developed factual record that is still unclear and hotly contested. Indeed, the parties have submitted new evidence by the hour over the past two days—none of which was presented to the panel. The panel's unpublished order recognized Jane Doe's interests without prematurely requiring the Government to act against its interests. The panel decision was prudent and reasonable, given all of the circumstances. Indeed, as noted above, the Government represents that, while difficult, it is possible for Jane Doe to obtain a sponsor by "5:00 P.M. Eastern on October 31, 2017." This case, as handled by the three-judge panel, therefore was on a path to a prompt resolution that would respect the interests of all parties—until the en banc Court unwisely intervened. This case did not meet the standard for rehearing en banc.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 17-cv-02122 (TSC)

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

ERIC D. HARGAN, ET AL., DEFENDANTS

[Oct. 24, 2017]

AMENDED TEMPORARY RESTRAINING ORDER

Upon consideration of Plaintiff's Emergency Motion to Amend the Temporary Restraining Order issued by this court on October 18, 2017 and the entire record in this case;

For substantially the same reasons given in Judge Millett's dissenting statement issued on October 20, 2017, and substantially adopted by the Court of Appeals in its Order of October 24, it appears to the Court that: (1) Plaintiff is likely to succeed on the merits of her action; (2) if Defendants are not immediately restrained from preventing her transportation to an abortion facility or otherwise interfering with or obstructing her access to an abortion—including by further forcing her to disclose her abortion decision against her will or disclosing her decision themselves, forcing her to ob-

tain pre- and/or post-abortion counseling from an anti-abortion entity, and/or retaliating against her for her abortion decision—Plaintiff J.D. will suffer irreparable injury in the form of, at a minimum, increased risk to her health, and perhaps the permanent inability to obtain a desired abortion to which she is legally entitled; (3) the Defendants will not be harmed if such an order is issued; and (4) the public interest favors the entry of such an order. It is, therefore,

ORDERED that Plaintiff's Emergency Motion to Amend the Temporary Restraining Order is hereby GRANTED, and that Defendants Eric Hargan, Steven Wagner, and Scott Lloyd (along with their respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them) are, for fourteen days from the date shown below, hereby:

1. Required to transport J.D.—or allow J.D. to be transported by either her guardian or attorney ad litem—**promptly and without delay**, on such dates, including today, and to such Texas abortion provider as shall be specified by J.D.'s guardian ad litem or attorney ad litem, in order to obtain the counseling required by state law and to obtain the abortion procedure, in accordance with the abortion providers' availability and any medical requirements. If transportation to the nearest abortion provider requires J.D. to travel past a border patrol checkpoint, Defendants are restrained from interfering with her ability to do so and are ordered to provide any documentation necessary for her to do so;

2. Temporarily restrained from interfering with or obstructing J.D.'s access to abortion counseling or an abortion;

3. Temporarily restrained from further forcing J.D. to reveal her abortion decision to anyone, or revealing it to anyone themselves;

4. Temporarily restrained from retaliating against J.D. based on her decision to have an abortion;

5. Temporarily restrained from retaliating or threatening to retaliate against the contractor that operates the shelter where J.D. currently resides for any actions it has taken or may take in facilitating J.D.'s ability to access abortion counseling and an abortion.

It is further ORDERED that Plaintiff shall not be required to furnish security for costs. Failure to comply with the terms of this Order may result in a finding of contempt.

Date: Oct. 24, 2017

/s/ TANYA S. CHUTKAN
TANYA S. CHUTKAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 17-cv-02122 (TSC)

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

ERIC D. HARGAN, ET AL., DEFENDANTS

[Oct. 24, 2017]

FINDINGS OF FACT IN SUPPORT OF AMENDED TEMPORARY RESTRAINING ORDER

The court makes the following findings of fact in support of its Amended Temporary Restraining Order (ECF No. 29):

1. Plaintiff J.D. is a 17 year-old unaccompanied minor who entered the United States without legal documentation in September 2017. (Decl. of J.D., ECF No. 3-3).

2. J.D. was detained at the U.S. border, and was remanded to a shelter in Texas under a cooperative agreement with the Office of Refugee Resettlement (ORR) on September 8, 2017. (Decl. of Jonathan White, ECF No. 25-1).

3. After entering the U.S., J.D. received a medical evaluation and confirmation that she was pregnant. (Decl. of Jonathan White, ECF No. 25-1).

4. J.D. chose to terminate her pregnancy. Pursuant to Texas law, and with the assistance of an appointed guardian ad litem and attorney ad litem, she sought a judicial bypass of Texas's parental notification and consent requirements, which she received on September 25, 2017.

5. In March 2017, the ORR announced that all federally funded shelters are prohibited from taking "any action that facilitates" abortion access for unaccompanied minors absent "direction and approval from the Director of the ORR." (ECF No. 3-5 at 2).

6. J.D. sought to obtain the state-mandated counseling and the abortion procedure on September 28, 2017 and September 29, 2017. Pursuant to its new policy enacted in March 2017, Defendants refused, and have continued to refuse to transport her to the facility and refused to allow anyone else to transport her to the facility. (ECF No. 3-4).

7. Although Defendants have taken steps to dissuade J.D. from having an abortion, including requiring her to obtain counseling from a religiously affiliated crisis pregnancy center and view a sonogram, J.D. remains steadfast in her desire to terminate her pregnancy. (Decl. of J.D., ECF No. 3-3).

8. Defendants maintain that J.D. may obtain an abortion only if (1) an individual indicates his or

her willingness to serve as a sponsor for J.D., qualifies for that position under applicable legal requirements, completes the administrative review process, and is approved by ORR, or (2) J.D. voluntarily returns to her home country, where Defendants concede abortion is illegal.

9. The process of identifying, vetting, and approving sponsors is lengthy and complex, involving multiple steps that can take weeks or months to complete. The process typically involves completion and submission of an application, requirements for extensive documentation of prior relationship to the minor and/or the minor's family, background checks, home visits, and multiple stages of administrative review. The minor has no control over the sponsorship process, and ultimately the decision whether to approve a particular sponsor rests with ORR. (Decl. of Robert Carey, ECF No. 23-1 at 2, 4, 5-7).

10. J.D. has obtained private funding to pay for the abortion, and her guardian and/or attorney ad litem have agreed to transport her to the abortion facility.

11. Texas law requires that an individual seeking an abortion must undergo counseling at least 24 hours in advance of the procedure by the same doctor who will perform the procedure. Oral Arg. 1:13:45-1:15:10.

12. J.D. first sought to terminate her pregnancy in late September, when she was approximately 11 weeks pregnant. She received judicial authorization on September 25, 2017. She is now ap-

proximately 15 weeks pregnant. Under Texas law, abortions are illegal after 20 weeks, and some doctors refuse to perform an abortion after more than 15.6 weeks. Oral Arg. 1:13:45-1:15:10.

Date: Oct. 24, 2017

/s/ TANYA S. CHUTKAN
TANYA S. CHUTKAN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 17-cv-02122 (TSC)

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

ERIC D. HARGAN, ET AL., DEFENDANTS

[Oct. 18, 2017]

TEMPORARY RESTRAINING ORDER

Upon consideration of Plaintiff's application for a temporary restraining order, and any opposition, reply, and further pleadings and arguments;

It appears to the Court that: (1) Plaintiff is likely to succeed on the merits of her action; (2) if Defendants are not immediately restrained from preventing her transportation to an abortion facility or otherwise interfering with or obstructing her access to an abortion —including by further forcing her to disclose her abortion decision against her will or disclosing her decision themselves, forcing her to obtain pre- and/or post-abortion counseling from an anti-abortion entity, and/or retaliating against her for her abortion decision— Plaintiff J.D. will suffer irreparable injury in the form of, at a minimum, increased risk to her health, and

perhaps the permanent inability to obtain a desired abortion to which she is legally entitled; (3) the Defendants will not be harmed if such an order is issued; and (4) the public interest favors the entry of such an order. It is, therefore,

ORDERED that Plaintiff's application for a temporary restraining order is hereby GRANTED, and that Defendants Eric Hargan, Steven Wagner, and Scott Lloyd (along with their respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them) are, for fourteen days from the date shown below, hereby:

1. Required to transport J.D.—or allow J.D. to be transported by either her guardian or attorney ad litem—**promptly and without delay** to the abortion provider closest to J.D.'s shelter in order to obtain the counseling required by state law on October 19, 2017, and to obtain the abortion procedure on October 20, 2017 and/or October 21, 2017, as dictated by the abortion providers' availability and any medical requirements. If transportation to the nearest abortion provider requires J.D. to travel past a border patrol checkpoint, Defendants are restrained from interfering with her ability to do so and are ordered to provide any documentation necessary for her to do so;

2. Temporarily restrained from interfering with or obstructing J.D.'s access to abortion counseling or an abortion;

3. Temporarily restrained from further forcing J.D. to reveal her abortion decision to anyone, or revealing it to anyone themselves;

4. Temporarily restrained from retaliating against J.D. based on her decision to have an abortion;

5. Temporarily restrained from retaliating or threatening to retaliate against the contractor that operates the shelter where J.D. currently resides for any actions it has taken or may take in facilitating J.D.'s ability to access abortion counseling and an abortion.

It is further ORDERED that Plaintiff shall not be required to furnish security for costs. Failure to comply with the terms of this Order may result in a finding of contempt.

Date: Oct. 18, 2017

/s/ TANYA S. CHUTKAN
TANYA S. CHUTKAN
United States District Judge

APPENDIX G

1. U.S. Const. Amend V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. 1232 (2012 & Supp. IV 2016) provides:

Enhancing efforts to combat the trafficking of children

(a) Combating child trafficking at the border and ports of entry of the United States

(1) Policies and procedures

In order to enhance the efforts of the United States to prevent trafficking in persons, the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence.

(2) Special rules for children from contiguous countries

(A) Determinations

Any unaccompanied alien child who is a national or habitual resident of a country that is contiguous with the United States shall be treated in accordance with subparagraph (B), if the Secretary of Homeland Security determines, on a case-by-case basis, that—

(i) such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality or of last habitual residence;

(ii) such child does not have a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution; and

(iii) the child is able to make an independent decision to withdraw the child's application for admission to the United States.

(B) Return

An immigration officer who finds an unaccompanied alien child described in subparagraph (A) at a land border or port of entry of the United States and determines that such child is inadmissible under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) may—

(i) permit such child to withdraw the child's application for admission pursuant to

section 235(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1225(a)(4)); and

(ii) return such child to the child's country of nationality or country of last habitual residence.

(C) Contiguous country agreements

The Secretary of State shall negotiate agreements between the United States and countries contiguous to the United States with respect to the repatriation of children. Such agreements shall be designed to protect children from severe forms of trafficking in persons, and shall, at a minimum, provide that—

(i) no child shall be returned to the child's country of nationality or of last habitual residence unless returned to appropriate employees or officials, including child welfare officials where available, of the accepting country's government;

(ii) no child shall be returned to the child's country of nationality or of last habitual residence outside of reasonable business hours; and

(iii) border personnel of the countries that are parties to such agreements are trained in the terms of such agreements.

(3) Rule for other children

The custody of unaccompanied alien children not described in paragraph (2)(A) who are apprehended at the border of the United States or at a United

States port of entry shall be treated in accordance with subsection (b).

(4) Screening

Within 48 hours of the apprehension of a child who is believed to be described in paragraph (2)(A), but in any event prior to returning such child to the child's country of nationality or of last habitual residence, the child shall be screened to determine whether the child meets the criteria listed in paragraph (2)(A). If the child does not meet such criteria, or if no determination can be made within 48 hours of apprehension, the child shall immediately be transferred to the Secretary of Health and Human Services and treated in accordance with subsection (b). Nothing in this paragraph may be construed to preclude an earlier transfer of the child.

(5) Ensuring the safe repatriation of children

(A) Repatriation pilot program

To protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.

(B) Assessment of country conditions

The Secretary of Homeland Security shall consult the Department of State's Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.

(C) Report on repatriation of unaccompanied alien children

Not later than 18 months after December 23, 2008, and annually thereafter, the Secretary of State and the Secretary of Health and Human Services, with assistance from the Secretary of Homeland Security, shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on efforts to improve repatriation programs for unaccompanied alien children. Such report shall include—

(i) the number of unaccompanied alien children ordered removed and the number of such children actually removed from the United States;

(ii) a statement of the nationalities, ages, and gender of such children;

(iii) a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence, including a description of the repatriation pilot

program created pursuant to subparagraph (A);

(iv) a description of the type of immigration relief sought and denied to such children;

(v) any information gathered in assessments of country and local conditions pursuant to paragraph (2); and

(vi) statistical information and other data on unaccompanied alien children as provided for in section 279(b)(1)(J) of title 6.

(D) Placement in removal proceedings

Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be—

(i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);

(ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and

(iii) provided access to counsel in accordance with subsection (c)(5).

(b) Combating child trafficking and exploitation in the United States

(1) Care and custody of unaccompanied alien children

Consistent with section 279 of title 6, and except as otherwise provided under subsection (a), the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.

(2) Notification

Each department or agency of the Federal Government shall notify the Department of Health and Human services[1] within 48 hours upon—

(A) the apprehension or discovery of an unaccompanied alien child; or

(B) any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.

(3) Transfers of unaccompanied alien children

Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

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[1] So in original. Probably should be capitalized.

(4) Age determinations

The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.

(c) Providing safe and secure placements for children

(1) Policies and programs

The Secretary of Health and Human Services, Secretary of Homeland Security, Attorney General, and Secretary of State shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity, including policies and programs reflecting best practices in witness security programs.

(2) Safe and secure placements

(A) Minors in department of health and human services custody

Subject to section 279(b)(2) of title 6, an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting

that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight. Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care. A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

(B) Aliens transferred from Department of Health and Human Services to Department of Homeland Security custody

If a minor described in subparagraph (A) reaches 18 years of age and is transferred to the custody of the Secretary of Homeland Security, the Secretary shall consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.

(3) Safety and suitability assessments

(A) In general

Subject to the requirements of subparagraph (B), an unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental wellbeing. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

(B) Home studies

Before placing the child with an individual, the Secretary of Health and Human Services shall determine whether a home study is first necessary. A home study shall be conducted for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 12102 of title 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence. The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a

home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.

(C) Access to information

Not later than 2 weeks after receiving a request from the Secretary of Health and Human Services, the Secretary of Homeland Security shall provide information necessary to conduct suitability assessments from appropriate Federal, State, and local law enforcement and immigration databases.

(4) Legal orientation presentations

The Secretary of Health and Human Services shall cooperate with the Executive Office for Immigration Review to ensure that custodians receive legal orientation presentations provided through the Legal Orientation Program administered by the Executive Office for Immigration Review. At a minimum, such presentations shall address the custodian's responsibility to attempt to ensure the child's appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.

(5) Access to counsel

The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland

Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

(6) Child advocates

(A) In general

The Secretary of Health and Human Services is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children. A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child. The child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate. The child advocate shall be presumed to be acting in good faith and be immune from civil liability for lawful conduct of duties as described in this provision.

(B) Appointment of child advocates

(i) Initial sites

Not later than 2 years after March 7, 2013, the Secretary of Health and Human Services shall appoint child advocates at 3 new immigration detention sites to provide independent

child advocates for trafficking victims and vulnerable unaccompanied alien children.

(ii) Additional sites

Not later than 3 years after March 7, 2013, the Secretary shall appoint child advocates at not more than 3 additional immigration detention sites.

(iii) Selection of sites

Sites at which child advocate programs will be established under this subparagraph shall be located at immigration detention sites at which more than 50 children are held in immigration custody, and shall be selected sequentially, with priority given to locations with—

(I) the largest number of unaccompanied alien children; and

(II) the most vulnerable populations of unaccompanied children.

(C) Restrictions

(i) Administrative expenses

A child advocate program may not use more that 10 percent of the Federal funds received under this section for administrative expenses.

(ii) Nonexclusivity

Nothing in this section may be construed to restrict the ability of a child advocate program under this section to apply for or obtain

funding from any other source to carry out the programs described in this section.

(iii) Contribution of funds

A child advocate program selected under this section shall contribute non-Federal funds, either directly or through in-kind contributions, to the costs of the child advocate program in an amount that is not less than 25 percent of the total amount of Federal funds received by the child advocate program under this section. In-kind contributions may not exceed 40 percent of the matching requirement under this clause.

(D) Annual report to Congress

Not later than 1 year after March 7, 2013, and annually thereafter, the Secretary of Health and Human Services shall submit a report describing the activities undertaken by the Secretary to authorize the appointment of independent Child Advocates for trafficking victims and vulnerable unaccompanied alien children to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

(E) Assessment of Child Advocate Program

(i) In general

As soon as practicable after March 7, 2013, the Comptroller General of the United States shall conduct a study regarding the effectiveness of the Child Advocate Program operated by the Secretary of Health and Human Services.

(ii) Matters to be studied

In the study required under clause (i), the Comptroller General shall—[2] collect information and analyze the following:

(I) analyze the effectiveness of existing child advocate programs in improving outcomes for trafficking victims and other vulnerable unaccompanied alien children;

(II) evaluate the implementation of child advocate programs in new sites pursuant to subparagraph (B);

(III) evaluate the extent to which eligible trafficking victims and other vulnerable unaccompanied children are receiving child advocate services and assess the possible budgetary implications of increased participation in the program;

(IV) evaluate the barriers to improving outcomes for trafficking victims and other vulnerable unaccompanied children; and

(V) make recommendations on statutory changes to improve the Child Advocate Program in relation to the matters analyzed under subclauses (I) through (IV).

(iii) GAO report

Not later than 3 years after March 7, 2013, the Comptroller General of the United States shall submit the results of the study required under this subparagraph to—

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[2] So in original.

(I) the Committee on the Judiciary of the Senate;

(II) the Committee on Health, Education, Labor, and Pensions of the Senate;

(III) the Committee on the Judiciary of the House of Representatives; and

(IV) the Committee on Education and the Workforce of the House of Representatives.

(F) Authorization of appropriations

There are authorized to be appropriated to the Secretary and Human Services[3] to carry out this subsection—

(i) $1,000,000 for each of the fiscal years 2014 and 2015; and

(ii) $2,000,000 for each of the fiscal years 2016 and 2017.

(d) Permanent protection for certain at-risk children

(1) Omitted

(2) Expeditious adjudication

All applications for special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.

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[3] So in original. Probably should be "Secretary of Health and Human Services".

(3) Omitted

(4) Eligibility for assistance

(A) In general

A child who has been granted special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) and who was in the custody of the Secretary of Health and Human Services at the time a dependency order was granted for such child, was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note) at the time such dependency order was granted, or has been granted status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)),,[2] shall be eligible for placement and services under section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)) until the earlier of—

(i) the date on which the child reaches the age designated in section 412(d)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1522(d)(2)(B)); or

(ii) the date on which the child is placed in a permanent adoptive home.

(B) State reimbursement

Subject to the availability of appropriations, if State foster care funds are expended on behalf of a child who is not described in subparagraph (A) and has been granted special immigrant status under section 101(a)(27)(J) of the Immigration

and Nationality Act (8 U.S.C. 1101(a)(27)(J)), or status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)),,[2] the Federal Government shall reimburse the State in which the child resides for such expenditures by the State.

(5) State courts acting in loco parentis

A department or agency of a State, or an individual or entity appointed by a State court or juvenile court located in the United States, acting in loco parentis, shall not be considered a legal guardian for purposes of this section or section 279 of title 6.

(6) Transition rule

Notwithstanding any other provision of law, an alien described in section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), as amended by paragraph (1), may not be denied special immigrant status under such section after December 23, 2008, based on age if the alien was a child on the date on which the alien applied for such status.

(7) Omitted

(8) Specialized needs of unaccompanied alien children

Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.

(e) Training

The Secretary of State, the Secretary of Homeland Security, the Secretary of Health and Human Services, and the Attorney General shall provide specialized training to all Federal personnel, and upon request, state[1] and local personnel, who have substantive contact with unaccompanied alien children. Such personnel shall be trained to work with unaccompanied alien children, including identifying children who are victims of severe forms of trafficking in persons, and children for whom asylum or special immigrant relief may be appropriate, including children described in subsection (a)(2).

(f) Omitted

(g) Definition of unaccompanied alien child

For purposes of this section, the term "unaccompanied alien child" has the meaning given such term in section 279(g) of title 6.

(h) Effective date

This section—

(1) shall take effect on the date that is 90 days after December 23, 2008; and

(2) shall also apply to all aliens in the United States in pending proceedings before the Department of Homeland Security or the Executive Office for Immigration Review, or related administrative or Federal appeals, on December 23, 2008.

(i) Grants and contracts

The Secretary of Health and Human Services may award grants to, and enter into contracts with, voluntary agencies to carry out this section and section 279 of title 6.

No. 17-654

IN THE

Supreme Court of the United States

ERIC HARGAN, *et al.*,

Petitioners,

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

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QUESTION PRESENTED

Whether this Court should review a court of appeals' fact-bound decision denying an emergency stay pending appeal for the sole purpose of vacating the decision, where the decision did not resolve any merits question raised by respondent's complaint, and where the petitioners may seek this Court's review of any future merits determinations.

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INTRODUCTION

Jane Doe is a 17-year-old who came to this country without her parents.[1] She was apprehended by the U.S. government and has been detained since September 2017 in a shelter run by a federal government grantee. After receiving a medical examination and being informed she was pregnant, Ms. Doe told shelter staff that she wanted an abortion. With the help of two court-appointed representatives, she received permission from a Texas state court to bypass the State's parental consent law and to consent to the abortion herself. She then sought to attend state-mandated pre-abortion counseling at a local clinic. Pursuant to a policy adopted in March 2017 by the Director of the Office of Refugee Resettlement (ORR) at the U.S. Department of Health and Human Services (HHS)—and in stark contrast to the policies of U.S. Immigration and Customs Enforcement (ICE) and the Bureau of Prisons (BOP)—the government refused to allow Ms. Doe to attend any abortion-related appointments.

Ms. Doe brought suit in federal district court seeking to enforce her right to an abortion, consistent with the Constitution and the state court's order. The government did not contest Ms. Doe's claim that she has a constitutional right to an abortion. Nor did it argue that allowing her to attend the appointments would violate statutory restrictions on the use of federal funds or any federal regulations. Instead, it argued that it should not have to "facilitate" her access to an abortion—even if it did not pay for, or transport Ms. Doe to, any appointments. Because she was in federal custody, this policy prevented Ms. Doe from

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[1] Respondent Garza is Ms. Doe's guardian ad litem.

exercising what the government did not contest is her constitutional right.

On October 18, 2017, the district court issued a temporary restraining order (TRO) that, among other things, directed the defendants to allow Ms. Doe to attend the necessary appointments. The same day, the government sought an emergency stay pending appeal, which a panel of the D.C. Circuit granted in part on October 20. On October 24, however, the D.C. Circuit *en banc* granted rehearing and denied the government's emergency request for a stay. This time, the government did not seek an immediate stay, even though nothing precluded it from doing so. On the next day, October 25, one month after the state court authorized Ms. Doe to obtain an abortion, she finally had the procedure.

Having failed to seek an emergency stay from this Court on October 24, as it had from the D.C. Circuit on the day the district court granted the TRO, the government filed this petition nine days *after* the events that it claims have rendered the issues in this case moot. The government does not seek review of the single legal issue decided by the court of appeals—whether the government's application for a stay pending appeal met the standards for obtaining such relief. Rather, it asks this Court to vacate that emergency, interlocutory ruling on the ground that some of Ms. Doe's claims for relief have been mooted by her abortion. The government then suggests that this Court should decide, in the first instance, that claims Ms. Doe seeks to bring on behalf of herself and a class are likewise moot and dismiss those claims now while they remain pending in district court. Simultaneously, the government suggests that this Court should consider issuing an order to show cause

why disciplinary action should not be taken against respondent's counsel "in light of the extraordinary circumstances of this case." Pet. 26.

But it is the government's petition that is extraordinary: The government asks this Court to grant certiorari without identifying any question worthy of review; it seeks vacatur under circumstances that the government has repeatedly argued do not warrant this Court's intervention; it asks this Court to direct dismissal of an array of claims not implicated by the decision below before any lower court has passed on them; and it suggests that this Court consider disciplinary action against lawyers for faithfully fulfilling their ethical duties to their client.

The petition should be denied for at least three reasons. First, as the government acknowledges, even where a case has become moot, the Court should not grant review for purposes of vacating a lower court's decision unless the petition independently presents an issue that would have been worthy of review prior to becoming moot. Yet the government identifies no such issue. The only question decided below was whether the government had met the requirements for a stay of a TRO pending appeal. That narrow, fact-bound issue, as to which the court of appeals applied the legal standard urged by both sides, is not remotely worthy of this Court's review. No other issues are presented because the court below did not decide any.

Second, even if the decision below presented an issue worthy of this Court's review, the relief the government seeks would not be warranted. The government's argument that this Court should vacate the decision below and direct the dismissal of all claims for prospective relief regarding pregnant

unaccompanied minors on the grounds that they are moot is erroneous. The claims in this case regarding the treatment of pregnant minors are currently being litigated in the district court, and finding that they are moot would contravene this Court's decisions recognizing exceptions to mootness in cases like this one where the factual basis for the claim is of a fleeting nature.

Third, vacatur is intended to protect parties who are prevented from appealing and who would be harmed by the binding effects of the mooted ruling on future litigation. In this case, however, and consistent with established law, the D.C. Circuit's interlocutory decision denying a stay has no preclusive effect on future litigation. Moreover, the government failed to take the steps necessary to preserve its appellate rights, and in all events retains a full opportunity to seek review of the future litigation following final judgment on those claims.

Finally, the government's suggestion that this Court should consider issuing an order to show cause why respondent's counsel should not be disciplined provides no basis to find that counsel's conduct presents grounds for concern, much less sanction. The petition does not present legal or factual grounds for its suggestion that respondent's counsel may have violated any applicable rule of professional conduct. To the contrary, the government's recitation of events shows that it failed to seek a stay from this Court in a timely manner based on assumptions it made about the timing of Ms. Doe's procedure, not on the basis of any commitments from Ms. Doe's lawyers.

COUNTERSTATEMENT OF THE CASE

A. Facts

In early September 2017, Jane Doe, a young woman of 17, entered the United States without her parents. She was apprehended by U.S. authorities and placed in HHS custody in a shelter run by a federal government grantee in Texas. Through ORR, HHS exercises its responsibility for the "care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate." 8 U.S.C. § 1232(b)(1). A nationwide consent decree requires ORR and its shelters to provide "appropriate routine medical . . . care, family planning services, and emergency health care services." Stipulated Settlement Agreement, Ex. 1 at 1, *Flores* v. *Reno*, No. CV-85-4544 (C.D. Cal. Jan. 17, 1997).

On March 4, 2017, the Acting Director of ORR issued a letter informing grantees of its policy of "prohibit[ing] [shelters] from taking any action that facilitates an abortion without direction and approval from the Director of ORR," D.D.C. Dkt. No. 3-5, a policy that effectively gives the ORR Director veto power over a young woman's abortion decision.

Once in HHS custody, Ms. Doe was given a medical examination and told that she was pregnant. 10/17/2017 White Decl. ¶ 7. She informed her custodians that she wished to terminate the pregnancy. *Id.* ¶ 8. ORR directed the shelter to inform Ms. Doe's mother of her pregnancy over Ms. Doe's objection. Appellee's Opp. to Mot. for Stay Pending Appeal 7 (Oct. 19, 2017). The government also required Ms. Doe to attend a counseling session at an anti-abortion center. 10/13/2017 Amiri Decl. ¶ 2; 10/11/2017 Doe Decl. ¶ 13.

To obtain an abortion under Texas law, a minor must obtain parental consent or a court order finding that she "is mature and sufficiently well informed to make the decision" on her own, or that "the notification and attempt to obtain consent would not be in the best interest of the minor." Tex. Fam. Code Ann. § 33.003(i)(1)–(2). A state court appointed a guardian ad litem and an attorney ad litem for Ms. Doe and, with their assistance, she received a court order on September 25 granting her authority to consent to an abortion without the knowledge or consent of her parents or legal guardian. Pet. App. 69a.

Under Texas law, Ms. Doe first had to attend counseling at least 24 hours in advance of the abortion with the physician who would perform the procedure. Pet. App. 70a. When Ms. Doe requested permission to attend that counseling on September 27, ORR refused. 10/17/2017 White Decl. ¶ 10.[2]

ORR took this position notwithstanding contrary ICE and BOP policies that allow detained women to obtain abortions, and despite the government's position in this case that Ms. Doe would have been free to have an abortion if ORR placed her with a sponsor, see Appellants' Emergency Mot. for Stay Pending Appeal 11 (Oct. 18, 2017).

B. Procedural History

On October 13, 2017, Ms. Doe's guardian ad litem filed suit in the U.S. District Court for the District of Columbia against the Acting Secretary of HHS and

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[2] In response, Ms. Doe filed a lawsuit in Texas state court on October 5, alleging state-law neglect by the shelter. That case is sealed and has been removed to federal court. Appellee's Opp. to Mot. for Stay Pending Appeal 10 n.6 (Oct. 19, 2017).

other department officials on behalf of Ms. Doe and a putative class of "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit," Compl. ¶ 47. The complaint alleges, among other things, that the defendants violated the Constitution by "obstructing, interfering with, or blocking [the minors'] access to abortion" and by revealing "information about [the minors'] pregnancy and abortions to their parents or other family members, including immigration sponsors." *Id.* ¶¶ 55–56. Respondent simultaneously sought a TRO to prevent the government "from obstructing [Ms. Doe's] access to abortion." *Id.* at 15. On October 18, respondent moved for class certification.

The district court granted a TRO later on October 18, requiring defendants either to transport Ms. Doe or to allow her to be transported "to the abortion provider closest to [the] shelter in order to obtain the counseling required by state law on October 19, 2017, and to obtain the abortion procedure on October 20, 2017 and/or October 21, 2017, as dictated by the abortion providers' availability and any medical requirements." Pet App. 73a. It also temporarily restrained the defendants from "further forcing [Ms. Doe] to reveal her abortion decision to anyone, or revealing it to anyone themselves" or from retaliating against her or the shelter. *Id.* at 74a. Within five hours that same day, the government not only filed a notice of appeal in the D.C. Circuit, but also an emergency motion for a stay pending appeal, and a request for a temporary administrative stay while the court considered the stay pending appeal. Pet. 8.

On October 19, a panel of the D.C. Circuit administratively stayed the TRO to the extent it

pertained to Ms. Doe's transportation to obtain an abortion on October 20 or 21. Order (Oct. 19, 2017). The court did not stay other parts of the TRO, including the portion relating to the counseling appointment on October 19. *Id.* Ms. Doe received state-mandated counseling on October 19. Pet. 11.

Following oral argument, the panel issued a per curiam decision on October 20 in which it vacated the portion of the TRO that required the defendants to transport Ms. Doe to either counseling or an abortion. The panel noted that the government "has assumed, for purposes of this case, that [Ms. Doe] . . . possesses a constitutional right to obtain an abortion in the United States." Pet. App. 2a–3a. The panel found that releasing Ms. Doe to a sponsor, which the government stated it was attempting to do, "does not unduly burden the minor's right under Supreme Court precedent to an abortion . . . . *so long as* the process of securing a sponsor to whom the minor is released occurs expeditiously." *Id.* at 2a (emphasis added). The court therefore remanded to the district court with instructions to allow HHS eleven more days—until 5:00 p.m. on October 31—to secure a sponsor and release Ms. Doe. If no sponsor was approved in that time, the order provided that Ms. Doe could seek a new TRO "or other appropriate order," which the government "may . . . immediately appeal." *Id.*

Judge Millett dissented. She pointed out that there was no "factual basis to think that remand will accomplish anything but a forced continuation" of Ms. Doe's pregnancy, given the government's failure to identify a sponsor after six weeks. Pet App. 13a. Judge Millett observed, moreover, that the vetting process for sponsors was "understandably rigorous" and controlled by HHS. *Id.* On the other side of the

balance, Judge Millett wrote, "[e]very day that goes by is another day that the federal government forces [Ms. Doe] to carry an unwanted pregnancy forward. Days also increase the health risks associated with an abortion procedure . . . . [I]f [she] is 17 or 18 weeks along by the time this issue is resolved, the doctors at the South Texas clinic nearest to her (assuming it still has availability) will likely no longer be willing to perform the procedure." *Id.* at 14a.

On Sunday, October 22, Ms. Doe's guardian ad litem filed an emergency petition for rehearing *en banc* in the D.C. Circuit. Shortly before 2 p.m. Central Time[3] on October 24, the D.C. Circuit *en banc* granted the petition for rehearing and denied the government's motion for a stay pending appeal. The court concluded that the government had "not met the stringent requirements for a stay pending appeal, substantially for the reasons" set forth in Judge Millett's dissent from the panel decision. Pet. App. 19a (citation omitted). At this point in time, the government could have immediately sought a stay from this Court,[4] just as it had immediately sought a stay from the court of appeals when the district court entered the TRO. But it chose not to.

Following the D.C. Circuit's decision, Ms. Doe's guardian ad litem filed an emergency motion to amend the TRO in the district court. Pet. 10. The district court granted the motion shortly after 4 p.m. on October 24 and issued an amended TRO that required the defendants to transport Ms. Doe, or allow her to be transported, "promptly and without delay, on such

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[3] All times listed in this brief reflect Central Time.

[4] *See* Sup. Ct. R. 23.

dates, including today, and to such Texas abortion provider as shall be specified by [Ms. Doe's] guardian ad litem or attorney ad litem, in order to obtain the counseling required by state law and to obtain the abortion procedure, in accordance with the abortion providers' availability and any medical requirements." Pet. App. 66a. Again, the government could have sought a stay from this Court at this point, but did not.

C. Post-TRO Events

Upon receiving the amended TRO at about 4:15 p.m., Ms. Doe's guardian ad litem emailed shelter and Department of Justice (DOJ) personnel requesting that they transport Ms. Doe to the clinic. Pet'rs' Ex. B.[5] Despite the court order, the shelter responded that it would have to wait for ORR instructions. Pet'rs' Ex. M at 7. In response, Ms. Doe's attorney attached the court's order and advised the shelter that she would initiate contempt proceedings if the government defied the order. Pet'rs' Ex. C.

Soon thereafter, a DOJ attorney called Ms. Doe's attorney to inform her that the shelter was transporting Ms. Doe. The DOJ attorney explained that the shelter needed advance notice "of the timing of any appointments," Pet. 13. At 5:26 p.m., government counsel emailed Ms. Doe's attorney to thank her for speaking earlier and "to confirm [the attorney's] understanding that the shelter had

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[5] The government proposes to lodge with the Court under seal exhibits of non-record material. Respondent's counsel has informed the Court that it has agreed with the government that it may utilize these exhibits in this brief, and seek to lodge its own, while protecting sensitive information and individuals' confidentiality. Respondent will seek to make these materials public with appropriate redactions.

arranged for transport services this evening per your email." Pet'rs' Ex. F. Government counsel continued: "I would appreciate it if you could let me and [the Assistant U.S. Attorney (AUSA) in Texas] know when the timing for tomorrow's procedure is clarified." *Id.* Ms. Doe's attorney replied minutes later stating that she appreciated the call, and that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know." Pet. 13.

Shortly after 6:00 p.m., shelter personnel emailed HHS and DOJ personnel that Ms. Doe's attorney ad litem had informed them that "'the window for appointment this evening was missed,'" and Ms. Doe should return to the shelter. Pet'rs' Ex. E.

At 6:17 p.m., Ms. Doe's attorney emailed DOJ attorneys to say that the doctor was unable to stay that evening, and that "[t]he ad litems will arrange with the shelter to have [Ms. Doe] arrive at the clinic at 7:30 a.m." the next morning. Pet'rs' Ex. F. A few minutes later, Ms. Doe's guardian informed shelter and DOJ personnel that Ms. Doe "has an appointment tomorrow morning at 7:30 a.m." at the clinic and "must be there on time." Pet'rs' Ex. G. The shelter confirmed that it would make "necessary arrangements to ensure minor is present." Pet'rs' Ex. H.

At 8:13 p.m., another DOJ attorney emailed Ms. Doe's attorneys to say that DOJ intended to seek a stay from the Supreme Court the next morning. Resp'ts' Ex. 1. One of Ms. Doe's attorneys emailed back to thank the attorney for letting him know. *Id.*

At 9:31 p.m., Ms. Doe's guardian ad litem informed shelter and DOJ personnel that Ms. Doe's "appointment has been moved to 4:15 a.m. at the address provided." Pet'rs' Ex. K. The shelter again

confirmed receipt and indicated it had made transportation arrangements. Pet'rs' Ex. L. Shelter personnel forwarded the email to HHS personnel at 11:56 p.m. to inform them that it had "not received confirmation of what service will take place tomorrow, we were under the impression [Ms. Doe] was going in for mandated counseling, however, provided newly requested time was issued at the request of health center and attending physician, it is unclear whether [Ms. Doe] will partake in mandated counseling or undergo medical procedure." Pet'rs' Ex. M at 3.

At 4:30 a.m. on Wednesday, October 25, shelter personnel emailed HHS personnel stating that the "health center charge nurse has *confirmed* that minor is scheduled to undergo medical procedure this morning." *Id.* at 1 (emphasis added).

After 8 a.m. that morning, Ms. Doe's abortion was performed by the doctor who had originally counseled her on October 19. In response to DOJ inquiries, Ms. Doe's attorney confirmed this fact in an email at 9:00 a.m. Pet. 15.

Although the petition states that at the time Ms. Doe had her abortion the government "believed that it had identified a potentially suitable sponsor," and "believed that the process could be completed within a week," *id.* at 6, it is now more than a month later, and the government *still* has not approved a sponsor; Ms. Doe remains in ORR custody. Had it not been for court intervention, Ms. Doe would still be pregnant, against her will, today.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT PRESENT A LEGAL ISSUE WORTHY OF THIS COURT'S REVIEW.

Having failed to seek a timely stay, the government now asks the Court to grant review of an interlocutory order that it contends is moot. By the government's own reasoning, the underlying decision presents no merits issues on which the Court could rule, even if it were so inclined. Instead, the government asks the Court to grant review to vacate the D.C. Circuit's decision, a form of relief this Court has described as an "extraordinary remedy," *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

To succeed in this unusual plea, the government must—consistent with its own longstanding view—demonstrate that the case would have independently warranted this Court's review had it not become (in the government's view) moot. See Pet. 23 n.4. It "has been the consistent position of the United States" that "the Court should deny review of cases (or claims) that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition, when such cases (or claims) do not present any question that would independently be worthy of this Court's review." U.S. Amicus Br. at 10, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31) (cert. denied); see U.S. Br. in Opp. at 5–8, *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900) (cert. denied); Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 968 n.33 (10th ed. 2013) (noting that the Court appears to follow the government's approach). This rule recognizes that this Court's review is "discretionary and exercised

circumspectly," and that "there is no unfairness in leaving the lower court's decision intact" where "the Court would have denied certiorari in any event." U.S. Br. in Opp. at 12–13, *Enron Power Mktg., Inc.* v. *N. States Power Co.*, 528 U.S. 1182 (2000) (No. 99-916) (cert. denied); *id.* at 11 (agreeing that the decision below was incorrect but urging denial in light of the government's longstanding position).

The government plainly cannot meet its own test. In fact, the petition barely presents any affirmative legal *argument* that the D.C. Circuit's decision would have warranted this Court's review if the government *had* sought review on the merits. It does not directly claim—because it cannot—that the court of appeals' decision denying a stay conflicts with any other circuit's decision, or with a prior decision of this Court. See Sup. Ct. R. 10. Instead, the petition contains a single sentence that merely notes that prior decisions of this Court support the view that "the government *generally need not* facilitate abortions." Pet. 22 (emphasis added).

The lower court did *not*, however, resolve the merits of Ms. Doe's constitutional claim or the government's argument that its refusal to "facilitate" Ms. Doe's abortion did not impose an unconstitutional "undue burden" on Ms. Doe.[6] The only matter decided below—and therefore the only question the government's petition *could have* presented—was whether the government's emergency motion for a stay of the TRO pending appeal should be denied because the

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[6] Because the government did not dispute below that Ms. Doe has a constitutional right to an abortion, it does not and could not appropriately raise that issue here.

government had "not met the stringent requirements" for such relief. Pet. App. 19a.

That narrow question is manifestly unworthy of this Court's review. Indeed, the government does not claim otherwise. Nor does it raise that legal issue for this Court's consideration. See Pet. I. And for good reason. The test for a stay pending appeal is highly fact-bound and inherently individualized. See *Nken* v. *Holder*, 556 U.S. 418, 426 (2009) (court weighs multiple factors: applicant's likelihood of success on the merits, whether applicant will suffer irreparable injury, balance of hardships, and public interest).[7] The petition does not argue that the court of appeals applied the incorrect legal test. And review of the court of appeals' application of *Nken* to the facts here is plainly not the stuff of certiorari. See Sup. Ct. R. 10; c.f., U.S. Br. in Opp. at 8, *Walmer* v. *Dep't of Def.*, 516 U.S. 974 (1995) (No. 95-230) (cert. denied) (urging denial of review of preliminary injunction ruling where the only question properly presented is the application of the established standard to "case-specific" facts).

Even if the court of appeals *had* ruled on the constitutionality of the government's actions—and in merely denying a stay pending appeal it manifestly did not—such a decision would not conflict with any of the cases the government cites. In those cases, the Court found that the government's actions were constitutional because they "place[d] no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." *Harris* v. *McRae*, 448 U.S. 297, 314 (1980) (quoting *Maher* v. *Roe*, 432 U.S. 464, 474

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[7] In addition to being only one of several factors, *likelihood* of success on the merits is not a determination on the merits. *See Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981).

(1977)); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 509 (1989); see generally *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 876 (1992) (undue burden standard). Because Ms. Doe was (and still is) in U.S. custody, the government's refusal to permit her to attend her appointments places her in a wholly different position.

The petition does not, moreover, explain why the government has an interest in restricting access to abortions by minors in its custody, but not adults in its custody. The government does not dispute that it transports women and "arrange[s]" for abortions when they are in ICE or BOP custody.[8] Yet, in apparent conflict with these policies, the government states that any steps to provide access to an abortion give rise to the interests it asserts, even if the government were to play no role in transporting or paying for an abortion. See Appellants' Resp. to Pet. for Reh'g En Banc 11–12 (Oct. 23, 2017).[9] Indeed, in its efforts to defeat class certification, the government now represents in the ongoing district court proceedings that HHS does not have a "policy" prohibiting minors from attending abortion-related appointments and questions whether there are any other cases in which the defendants

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[8] *See* ICE, *Detention Standard 4.4, Medical Care (Women)*, at 325 (revised Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf (if an ICE detainee requests abortion, ICE "shall arrange for transportation at no cost" to the detainee); 28 C.F.R. § 551.23(c) (federal inmate may decide whether to have an abortion and, if she does, "the Clinical Director shall arrange for an abortion to take place").

[9] *See also* Pet. App. 29a (concurrence of Millett, J.) (government did not need to (1) pay for Ms. Doe's abortion, (2) transport her; (3) complete any paperwork or administrative measures (since the contractor detaining Ms. Doe advised that it was willing to do so); or (4) complete its own "best interests" form).

"have refused to release a minor in ORR care to obtain an abortion." Defs.' Opp. to Mot. for Class Certification 25 (Nov. 20, 2017).

Finally, the emergency interlocutory posture of the decision below makes it an exceedingly poor vehicle for addressing any of these issues, even if they were otherwise properly presented. This Court's review of interlocutory determinations is the exception rather than the rule. See *Va. Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of writ of certiorari). Here, the government itself argued that *en banc* review was "premature" and "inappropriate at this interlocutory stage of the case" because of the lack of a well-developed factual record given the expedited proceedings. Appellants' Resp. to Pet. for Reh'g En Banc 12–14 (Oct. 23, 2017) (focusing on claims about the sponsorship process and Ms. Doe's immigration status); see also Pet. App. 63a n.6 (Kavanaugh, J., dissenting) (factual record in this case is both "under-developed" and "still unclear and hotly contested").

In short, the petition fails to show—or even to argue in full—that the decision below warrants this Court's review.

II. MS. DOE'S CLAIMS REGARDING THE TREATMENT OF PREGNANT MINORS ARE NOT MOOT.

The only question the government presents for the Court's review is whether it should vacate the D.C. Circuit's decision and remand with instructions to dismiss *"all claims* for prospective relief regarding pregnant unaccompanied minors" on the ground that such claims were mooted by Ms. Doe's abortion. Pet. I, 19 (emphasis added). The government fails, however,

to demonstrate that *any* of the claims for prospective relief in Ms. Doe's complaint regarding the treatment of pregnant unaccompanied minors are moot. The relief it requests from this Court—vacatur of the denial of a stay pending appeal followed by dismissal of an array of claims that are still being litigated below—is therefore unwarranted.[10]

As an initial matter, Ms. Doe indisputably has live claims for injunctive relief to prevent the government from retaliating against her for her decision to have an abortion and to prevent it from disclosing information about her abortion decision to third parties. See Pet. App. 67a (amended TRO); Order (Oct. 30, 2017) (extending portions of the TRO); Compl. 16. The government appears to agree that these claims remain live. See Pet. 24 (discussing disclosure claim).[11] Ms. Doe also seeks to bring these claims on behalf of the class. Compl. 16.

In addition, Ms. Doe's claims regarding access to abortion—for which she also seeks injunctive relief, Compl. 15–16—fall into established exceptions to mootness. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) ("[p]regnancy provides a classic justification for a conclusion of nonmootness"). This is particularly the case here, where Ms. Doe brings these claims on behalf of both herself and a class of minors in HHS custody.

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[10] The government does not claim—indeed it could not—that vacatur is warranted because *the case* has become moot. Thus, even in its own view, the Court's "general practice" under *Munsingwear* would not be appropriate here. Pet. 24. Instead, it requests that this Court decide in the first instance that *certain* of Ms. Doe's claims are moot and direct their dismissal.

[11] Indeed, the government has filed a still-pending motion seeking to modify the TRO to permit it to disclose Ms. Doe's abortion. Defs.' Mot. for Recons. of the Court's October 30, 2017 Order Extending the Am. TRO (Nov. 6, 2017).

Compl. ¶¶ 55–56. Indeed, courts have recognized in the class action context that claims based on temporary conditions may continue *even if* the putative named plaintiff's claims become moot during the litigation. The government is therefore incorrect that "claims for injunctive relief" related to the putative class are moot. Pet. 25. This Court has repeatedly stated that a class action remains live in various circumstances where a motion for class certification was filed prior to the named plaintiff's claim becoming moot. See, *e.g.*, *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991) ("That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction."); *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 398–99 (1980) ("named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation" when claims are "capable of repetition, yet evading review," or "inherently transitory"); *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978); *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975); *Sosna* v. *Iowa*, 419 U.S. 393, 402 n.11 (1975).

In this case, Ms. Doe moved for class certification on October 18, when she was indisputably a member of the putative class. And the primary claim on which Ms. Doe seeks to represent a class—the right to access abortion services while in U.S. custody—is the archetypal example of a claim that is both inherently transitory and "capable of repetition yet evading review." See, *e.g.*, *Roe*, 410 U.S. at 125; *Doe* v. *Bolton*, 410 U.S. 179, 187 (1973); *Doe* v. *Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975); *Ciarpaglini* v. *Norwood*, 817 F.3d 541, 547 (7th Cir. 2016) (characterizing pregnancy as an "inherently transitory" situation). In fact, the Court has

specifically cited the abortion context as an example of the type of claim that is appropriate for class-action treatment even in circumstances where the named plaintiff's claim has become moot. See *Geraghty*, 445 U.S. at 398, 416 n.9 (citing *Roe*). Here, Ms. Doe was not only pregnant but also in federal custody, "[t]he length of [which] . . . is impossible to predict." *Thorpe* v. *Dist. of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013); see also *Geraghty*, 445 U.S. at 399.

The government argues that these exceptions to class action mootness cannot apply in this case because "[w]e simply do not know whether the district court could have ruled on Ms. Doe's motion for class certification before her interest . . . otherwise would have expired." Pet. 26. But this is not the test. Instead, courts look to the uncertainty surrounding the length of the condition as a general matter. See *Geraghty*, 445 U.S. at 399 ("It is *by no means certain* that *any given individual*, named as plaintiff, would be in [custody] long enough for a district judge to certify the class." (emphasis added) (quoting *Gerstein*, 420 U.S. at 110, n.11)); *Olson* v. *Brown*, 594 F.3d 577, 582 (7th Cir. 2010) ("it is uncertain that any potential named plaintiff in the class of inmates would have a live claim long enough for a district court to certify a class").

The government's request for this Court's intervention should be rejected. Its argument that Ms. Doe's claims for prospective relief regarding pregnant unaccompanied minors have been mooted is incorrect. The litigation continues below, and there is no justification for this Court to disrupt that process by prematurely dismissing Ms. Doe's legal claims.[12]

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[12] The petition does not, moreover, cite cases where this Court has granted review in order to direct vacatur of an interlocutory ruling in such a posture.

III. VACATUR IS NOT WARRANTED.

The government's asserted rationale for vacatur is equally unpersuasive. The petition seeks to vacate the D.C. Circuit's decision to ensure that the ruling does not "spawn[] any legal consequences." Pet. 23 (quoting *United States* v. *Munsingwear*, 340 U.S. 36, 41 (1950)). Even if this rationale constituted sufficient grounds for the Court to grant discretionary review and vacate (and the government agrees it does not, *see supra* Section I), the supposed "legal consequences" are wholly illusory. No purpose would be served by the relief the government seeks. The D.C. Circuit's interlocutory stay decision controls none of the issues being litigated. If and when the courts below reach the merits and resolve the outstanding issues, the government will have a full opportunity to seek further review.

The government points to Ms. Doe's *Bivens* claims and her putative class action as matters that it fears will be "constrained" by the decision below. Pet. 23–24. That argument might carry force had the court of appeals actually resolved the merits of any issue presented in the complaint. But, as explained above, the only issue before the court of appeals, and all it decided, was whether the defendants were entitled to a stay pending appeal. Particularly given the summary nature of its order, this interlocutory ruling will not "constrain" a future court that is presented with the merits following full briefing. See 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4478.5, at 797 (2d ed. 2002) ("law of the case is not established by . . . denial of a stay . . . pending appeal"). Even rulings on preliminary injunctive relief are not controlling with respect to subsequent final determinations on the merits. See *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394–95

(1981); *Berrigan* v. *Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974). The government will be free to seek both appellate court review and this Court's review when the case reaches final judgment on the merits—which is yet another reason for denying the petition. See *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring in denial of certiorari).

At bottom, the government appears to be asking the Court for a do-over in light of its failure to seek immediate review of the court of appeals' decision. But that is a problem of its own making, and it fails to identify any reason this Court's resources should be expended reviewing the denial of an emergency stay pending appeal. Seeking an immediate stay from this Court when it was still timely to do so would have been completely consistent with the proceedings in this case.[13] Like *Munsingwear* itself, this is a case "where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself." 340 U.S. at 41. This Court should therefore decline to vacate the decision below. See *Mahoney* v. *Babbitt*, 113 F.3d 219, 221–22 (D.C. Cir. 1997) (vacatur of preliminary injunction not appropriate where government failed to seek a Supreme Court stay before the mooting event occurred the day after the injunction).

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[13] For instance, when the district court issued the initial TRO on October 18 at 3:17 p.m., the government filed a notice of appeal, a motion for a stay pending appeal, and an administrative stay by 8:20 p.m. the same day. After the *en banc* court of appeals issued its October 24 order at 1:49 p.m., respondent's counsel filed a motion for an amended TRO at 3:04 p.m.

IV. THERE IS NO BASIS FOR DISCIPLINARY ACTION AGAINST RESPONDENT'S COUNSEL.

The government's concluding suggestion that this Court "may wish to issue an order to show cause why disciplinary action should not be taken" against respondent's counsel, Pet. 26, is both extraordinary and baseless. It finds no support in the facts or the law.

The government's recitation of events shows that: (1) Ms. Doe's counsel made a series of *accurate* statements concerning the availability of, and logistics surrounding, Ms. Doe's ability to obtain an abortion; (2) some government personnel may have incorrectly *assumed* that Ms. Doe could not obtain an abortion before October 26, even though she was legally entitled to obtain an immediate abortion, and had received state-mandated counseling on October 19; (3) some government lawyers may have *believed* that Ms. Doe's counsel would advise them if facts changed; and (4) Ms. Doe's counsel did not take affirmative steps to notify the government that the doctor who provided the counseling on October 19 agreed to come back to the clinic. The government's suggestion that this might amount to sanctionable misconduct is not supported by legal authorities regarding attorney conduct, is not remotely justified by the disciplinary cases it cites,[14] and is contrary to counsel's respective ethical duties.

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[14] *E.g.*, *In re Hall*, 57 S. Ct. 107 (1936) (disbarment order related to *In re Hall*, 56 S. Ct. 86 (1935) (attorney special master abused appointment to coerce a litigant)); *In re Davis*, 289 U.S. 704 (1933) (reprimand for failure to respond to communications from the clerk regarding outstanding fees); *In re Gilbert*, 276 U.S. 294 (1928) (suspension for improperly retaining fees); *In re Moore*, 177 F. Supp. 2d 197, 1998–99 (S.D.N.Y. 2001) (explaining that *In*

In an effort to show otherwise, the government repeatedly claims that opposing counsel "represented" "that no abortion would take place until October 26," Pet. 11; see also *id.* at 13, 14, 19. Yet no such representation appears in the emails or the declaration of the AUSA lodged with the Court by the Solicitor General that the government cites. Instead, the events recited in the petition indicate that Ms. Doe's representatives stated at various times on October 24 that the physician who was available at the clinic on October 24 (who was not the physician who originally provided the state-mandated counseling) could provide a new counseling session, which would trigger a 24-hour waiting period. See 11/1/2017 AUSA Decl. ¶¶ 6–7. The government does not claim that any of these statements was false.

The government also points to statements that respondent's counsel made to the district court on October 24. The petition states that respondent's counsel represented to the court "that for Ms. Doe to obtain an abortion, she would need to complete a two-step, 24-hour process." Pet. 12. But this misrepresents counsel's filing. Counsel requested an amendment to the original TRO to make clear that its relief and the government's obligation to transport or allow Ms. Doe to be transported should be effective that very day. In support of this change, counsel noted that "a qualified

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re Disbarment of Moore, 529 U.S. 1127 (2000), involved a petition for certiorari that failed to address the merits and accused lower court of corruption)); *see also In re Shipley*, 135 S. Ct. 1589, 1589–90 (2015) (discharging show cause order regarding Supreme Court Rule 14.3 requirement that petitions for writs of certiorari be stated "in plain terms," and noting that attorneys "may not delegate that responsibility to the client"); *In re Sibley*, 63 S. Ct. 438 (1943) (discharging show cause order without identifying conduct at issue).

physician is available at the nearest clinic today, and will be available to perform the procedure tomorrow." Pl.'s Emergency Mot. to Amend the TRO 2 (Oct. 24, 2017).[15] The motion specifically noted that it sought to ensure that Ms. Doe could "obtain the abortion . . . without further delay and as *may* be required by Texas state law and the *availability of physicians*." *Id.* at 1 (emphases added). The motion thereby made clear that the TRO should enable Ms. Doe to obtain an abortion at the earliest time and from any available physician.

As this motion underscores, Ms. Doe's counsel did not represent that, in making arrangements for her to see the physician who was at the clinic on October 24, they were forswearing any effort to secure an appointment with any other doctor who might be able to provide the abortion. Indeed, the government knew—and by its own account acknowledged to Ms. Doe's representative on October 24—that the original doctor could perform the procedure without the need to repeat counseling. See 11/1/2017 AUSA Decl. ¶ 7.[16]

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[15] This statement was not only true, it provided new information; as of oral argument on October 20, there were *no* doctors scheduled to be at the clinic the week of October 23 after October 24. D.C. Cir. Oral Arg. 1:13:43–1:14:51, https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByMonday?OpenView&StartKey=201710&Count=37&scode=3.

[16] The AUSA's declaration states that, in response, the attorney ad litem stated she was referring to "a different doctor" who could perform the abortion on Thursday. 11/1/2017 AUSA Decl. ¶ 7. By the government's own account, this statement was entirely accurate. The declaration indicates that the attorney ad litem was talking about the doctor who was at the clinic on October 24, and the fact that new arrangements were being contemplated so that that doctor could remain at the clinic longer to provide the procedure. *See id.* ¶ 6.

It also knew that Ms. Doe's representatives were considering various logistical arrangements to ensure that a doctor would be available to provide her abortion. *Id.* ¶ 6. These facts show that the situation was fluid; Ms. Doe's representatives were considering multiple alternatives; and they were seeking to obtain Ms. Doe's long-delayed abortion as soon as possible. The government implies that it reasonably believed these alternatives did not include any effort to return the original doctor to the facility, and claims that Ms. Doe's attorney ad litem had stated that this doctor "was not available," Pet. 13. But this suggestion rests on yet another misleading paraphrase: According to the government's own declaration, the attorney ad litem stated that the original doctor "was not available *on October 24*." 11/1/2017 AUSA Decl. ¶ 6 (emphasis added). The government does not claim that the statement actually made was inaccurate, or that it was a representation that Ms. Doe's counsel would make no effort to have that doctor return to the facility on October 25.

The government also points to a telephone call and exchanges of emails on October 24 in an effort to suggest that respondent's counsel provided assurances that the government did not need to request a stay because the abortion would not occur until October 26. Specifically, the government makes much of an email exchange in which one of its lawyers said the attorney "would appreciate it if [Ms. Doe's counsel] could let me and [the AUSA] know when the timing for tomorrow's procedure is clarified," Pet'rs' Ex. F, and Ms. Doe's counsel stated that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know," Pet. 13.

The government takes this exchange entirely out of context. Less than an hour earlier, the shelter had refused to transport Ms. Doe to the clinic until it had ORR's approval, and the government had been advised that opposing counsel would "initiate contempt proceedings" if Ms. Doe was not transported to the clinic promptly. Pet'rs' Ex. C. The government attorney called respondent's counsel shortly thereafter to explain that the shelter needed advance notice to arrange transportation, and to confirm that Ms. Doe was now being transported to the clinic. See Pet. 12–13. The government attorney then sent the email that confirmed "[the attorney's] understanding that the shelter had arranged for transport services this evening per your email," and included the attorney's request for information about the timing of "tomorrow's procedure." Pet'rs' Ex. F.

In context, the email exchange merely documents the government's compliance with its obligation under the TRO to provide transportation, its commitment to do so again the following day, and counsel's agreement to let the government know when Ms. Doe needed to be at the clinic the next day to avoid any further problems with transportation.[17] Critically, the government's email does not mention any stay motion, let alone link the request to the timing of such a filing. Nor does the government claim that its attorney mentioned any stay application in the earlier call. It is now wishful thinking to argue that this exchange over

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[17] At the time of the government's email, Ms. Doe was being transported for pre-abortion counseling. The request for information about the timing of the next day's "procedure" is thus sensibly understood as no more than a request to be informed of Ms. Doe's schedule the next day so that the necessary transportation could be arranged.

transportation logistics reflects a mutual understanding that the government need not seek a stay because opposing counsel "had represented to the government that . . . no abortion would occur until the morning of October 26," Pet. 19.

The government's claim is further belied by the email exchange the government points to from later in the evening of October 24. The government asserts that, "[b]ased on the representations of counsel that no abortion would occur until October 26," it informed the Clerk's Office and respondent's counsel that it would seek a stay the morning of October 25. Pet. 14. But by the government's own account, no communication about the timing of a motion for a stay occurred until 8:13 p.m. the night of October 24 and, even then, the email the government sent informing respondent's counsel that it would seek a stay in the morning says nothing about any such representations. Resp'ts' Ex. 1. Nor does it communicate the government's "understanding" about the timing of the procedure or seek confirmation that respondent's counsel shared that understanding, much less a commitment that her counsel would promptly advise the government of any changed circumstances. *Id.* The response from one of Ms. Doe's lawyers likewise includes no such confirmation or commitment. *Id.* Indeed, one of her attorneys responded to the 8:13 p.m. email by expressing relief that he would not have to check his email for any stay motion filed later that night. That email indicates that Ms. Doe's attorneys had expected the government to seek a stay that night—an expectation wholly inconsistent with the government's suggestion that there was a mutual understanding that filing was unnecessary because Ms. Doe's counsel

has represented that the abortion would not occur until October 26.

The Solicitor General argues that these statements and events of October 24 led some government personnel to *assume* that Ms. Doe would not be able to obtain an abortion prior to October 26. See Letter from Noel J. Francisco, Solicitor General, to David D. Cole, National Legal Director, ACLU 2 (Oct. 26, 2017) (stating that it relied on representations of counsel and others and "our *resulting understanding* that no abortion procedure could then take place" until October 26) (emphasis added)). But none of the statements the government cites was a representation, much less a commitment, "that no abortion would take place until October 26," Pet. 11.

The petition describes a course of events where many different parties were communicating into the night as events unfolded rapidly. Particularly given this fluid situation, and the government's knowledge that Ms. Doe had sought throughout the litigation to obtain an abortion as soon as possible, it is striking that government counsel, by the government's own account, neither *requested* that Ms. Doe forbear from obtaining the procedure while the government sought a stay from this Court nor sought confirmation of government counsel's "understanding" that no abortion would occur prior to October 26. Absent such a commitment or confirmation, it was incumbent upon government counsel immediately to seek a stay. The government cannot now blame opposing counsel for its own failure either to act with its customary alacrity or to take any protective steps.

In short, Ms. Doe's counsel had made clear that they were attempting to help their client obtain the

abortion as soon as possible; the government knew Ms. Doe had already received counseling from the original doctor, so that if that doctor became available, the abortion could take place immediately; and according to the government's own recitation of events, it did not link its request for information about the timing of Ms. Doe's appointment on October 25 with any statement concerning the timing of a stay motion with this Court.

To suggest that respondent's counsel had a duty to forbear from effectuating the TRO on October 25 under these facts would turn counsel's ethical obligations on their head. The only reason Ms. Doe's representatives needed to talk to government personnel *at all* was to tell them the timing of Ms. Doe's appointment so that the government would not delay Ms. Doe's transportation to the clinic. If government counsel wished to ensure that they would have an opportunity to seek a stay before the abortion procedure, they could and should have requested such an assurance from respondent's counsel and, if they did not receive a sufficiently clear commitment, they could and should have immediately sought relief from this Court. They inexplicably failed to take these reasonable steps, and cannot now blame respondent's counsel for the consequences of their own inaction.

In addition to failing to supply a factual basis for its extraordinary request, the government fails to supply a specific legal rationale or cite to any legal authority that supports its position. The petition vaguely refers to "what appear to be material misrepresentations and omissions" by respondent's counsel, Pet. 26, a claim that, if true, would violate ethical rules. See ABA, *Model Rules of Professional Conduct* R. 3.3 (2016) (prohibiting knowingly false statement of fact to a tribunal); *id.* R. 4.1(a) (barring "a false statement of

material fact or law to a third person"); *id.* R. 4.1 cmt. 1 (misrepresentations). But the government identifies no misrepresentations and fails to explain how counsels' statements and/or actions would have amounted to false statements. The petition says that respondent's counsel "arguably" had an obligation to notify the government that Ms. Doe's original physician had become available on the morning of October 25. Pet. 28. Yet the petition cites to no rule of ethics, case law, or other authority to support such an obligation. Indeed, no such obligation exists—and for sensible reasons. A lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," except "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." ABA, *supra*, R. 4.1 & cmt. 1; see *id.* cmt. 3. A lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law," *id.* pmbl., and violates that duty "when he or she . . . fails to take the necessary steps to preserve the client's interests," *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998), or to maintain client confidentiality, see *In re Gonzalez*, 773 A.2d 1026, 1030–31 (D.C. 2001).[18] The events the government recites show that Ms. Doe's counsel acted in their client's best interests, which is precisely what counsel are supposed to do. The government's extraordinary

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[18] Far from requiring Ms. Doe's counsel to apprise the government of the details of Ms. Doe's medical appointments, ethics rules would have precluded them from agreeing to do so if it would undermine her interests. *See* David Luban, *DOJ's Stance on Illegal Immigrant Abortion Case is Clear Jab at ACLU*, The Hill (Nov. 9, 2017), http://thehill.com/opinion/healthcare/359617-dojs-stance-on-illegal-immigrant-abortion-case-is-clear-jab-at-aclu.

request that the Court consider disciplinary action should be rejected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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December 4, 2017

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No. 17-654

In the Supreme Court of the United States

ERIC D. HARGAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent's brief in opposition is most remarkable for what it does not say. Respondent does not dispute that, after the lower courts ruled late in the afternoon of Tuesday, October 24, Ms. Doe's representatives told the government that Ms. Doe would receive counseling from a new doctor on the morning of October 25, with the abortion to follow on October 26; and that, in reliance on those representations, the government informed respondent's counsel it would file a stay application the morning of October 25, rather than late at night on October 24. Respondent is noticeably silent on what happened next. She does not deny that, after the government's notice, Ms. Doe's representatives secured the services of the original doctor and changed the na-

ture of Ms. Doe's appointment without telling the government.[1] Nor does respondent deny that these actions were a deliberate effort to prevent this Court's review. Respondent contends only that, as a legal matter, the conduct should carry no consequences, either with respect to vacating the court of appeals' judgment or disciplining her attorneys. That is incorrect.

First, this is a classic case for vacatur of a decision that was mooted by respondent's conduct on the way to this Court, "'clear[ing] the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (citation omitted). The decision issued by the divided en banc court on an important question of constitutional law plainly would have warranted this Court's review, but for the actions of Ms. Doe's representatives. And Ms. Doe's claims for prospective relief became moot when she underwent an abortion. The potential legal consequences to the government of leaving in place the court of appeals' erroneous decision justify this Court's intervention.

Second, this Court historically has been its own judge of whether conduct is "unbecoming a member of [its] Bar," Sup. Ct. R. 8.2, and the conduct here speaks for itself. The Model Rules and ethical principles governing the legal profession, however, lead to the same conclusion. Ms. Doe's representatives may have been free to say nothing about the timing of her procedure. But they could not make repeated representations to

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[1] Although respondent does not explain precisely what happened during the night of October 24 and early morning of October 25, she does not dispute that her counsel were involved or that they were aware of the earlier representations made by Ms. Doe's attorney ad litem and guardian ad litem.

the government (and the courts) about that procedure's timing, know that the government was relying on those statements, act to render the statements false, and then say nothing to correct the falsehood. That is not conduct becoming members of the Bar of this Court.

1. Respondent does not dispute that when an appeal becomes moot "while on its way [to this Court]," the established practice of this Court is to "vacate the judgment below and remand with a direction to dismiss," at least when the appeal otherwise would have warranted further review. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see Pet. 20, 23 n.4; see also *Arave* v. *Hoffman*, 552 U.S. 117, 118-119 (2008) (per curiam) (following the practice where not every claim in the case had become moot). Respondent's arguments for not following that practice here lack merit.

a. Respondent contends (Br. in Opp. 13-14) that the decision below would not have "warranted this Court's review," because the en banc court of appeals resolved only the government's stay motion, not "the merits of Ms. Doe's constitutional claim." That contention is incorrect for two reasons. First, after denying the government's request for a stay, the court remanded the entire case to the district court for further proceedings. Pet. App. 19a. In so doing, the court clearly considered itself to have resolved the entire appeal by effectively affirming the district court's temporary restraining order (TRO). If the court had resolved only the government's motion for a stay pending appeal, the appeal would have remained before the court for a resolution of the merits.[2] Second, the en banc court denied a stay

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[2] Although TROs are generally not appealable, the court of appeals correctly concluded that the district court's order was "more akin to preliminary injunctive relief and [wa]s therefore appealable

for "substantially" the reasons set forth in Judge Millett's panel statement, *ibid.*, which addressed at length the constitutional question, see *id.* at 7a-17a. By adopting Judge Millett's statement, the en banc majority took a position on the merits, and that is exactly how the dissenters understood it. See *id.* at 54a (Kavanaugh, J., dissenting) ("Today's majority decision * * * is ultimately based on a constitutional principle as novel as it is wrong.").

Because respondent misunderstands what the en banc court decided, she similarly misunderstands (Br. in Opp. 15) what question would have been presented for this Court's review. Absent the conduct of Ms. Doe's representatives, the government would have sought an emergency stay from this Court, pending a petition for a writ of certiorari that presented the constitutional question—*i.e.*, whether an unaccompanied alien minor may require the government to facilitate an elective abortion when the minor may leave the government's custody by requesting voluntary departure or identifying a suitable sponsor. See Pet. 17-18. Respondent's contention (Br. in Opp. 15-16) that the constitutional question would not have warranted this Court's review ignores its obvious legal and practical significance and the fact that the court of appeals considered it en banc and was deeply divided over it. See Emergency Pet. for Reh'g En Banc 12 (urging rehearing en banc based on the "exceptional importance" of the issues presented).

In seeming recognition that the merits would have been presented here, respondent addresses them. See Br. in Opp. 15-17. She acknowledges that, "although government may not place obstacles in the path of a

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under 28 U.S.C. § 1292(a)(1)." Pet. App. 19a n.1 (citing *Sampson* v. *Murray*, 415 U.S. 61, 86 n.58 (1974)).

woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris* v. *McRae*, 448 U.S. 297, 315-316 (1980). Here, Ms. Doe may take steps to end her federal custody by requesting voluntary departure or by identifying a suitable sponsor. But until she does—unlike for adults in the custody of Immigration and Customs Enforcement or the Bureau of Prisons—the Director of the Office of Refugee Resettlement of the Department of Health and Human Services (HHS) is charged by Congress with overseeing Ms. Doe's care and custody.[3] See 6 U.S.C. 279. In that circumstance, the government should not be required to facilitate an abortion, whatever the level of time, attention, or resources it would have to devote. The en banc majority's contrary conclusion "represents a radical extension of the Supreme Court's abortion jurisprudence." Pet. App. 54a (Kavanaugh, J., dissenting).

Finally, respondent argues (Br. in Opp. 17) that the emergency interlocutory nature of the decision below would have counseled against further review. But this Court reviews interlocutory decisions that turn on the resolution of important legal issues. See, *e.g.*, *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015); *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *NASA* v. *Nelson*, 562 U.S. 134 (2011). That course would have been particularly appropriate here, given that the "interlocutory" order granted Ms. Doe full relief on the relevant claims. As for the emergency posture, the en banc majority set aside the panel's modest, unpublished order and replaced it with a decision of constitutional law

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[3] At the time that Ms. Doe underwent an abortion, HHS believed it had identified a potentially suitable sponsor. Pet. 6. Ultimately, however, the individual chose not to apply.

in less than 48 hours, without oral argument, and after requiring the government to respond to the rehearing petition literally overnight. Those circumstances would have been more reason, not less, for further review. See Pet. App. 63a (Kavanaugh, J., dissenting).

b. Respondent also contends that Ms. Doe's claims for prospective relief are not moot because they "fall into established exceptions to mootness." Br. in Opp. 18; see *id.* at 17-20. As an initial matter, Ms. Doe's claims regarding access to abortion are not "capable of repetition yet evading review." *Id.* at 19. That exception applies only where "(1) 'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there is a reasonable expectation that *the same complaining party* will be subject to the same action again.'" *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (emphasis added) (brackets and citation omitted). Here, Ms. Doe—who will turn 18 in January—does not argue that she has a reasonable expectation of becoming pregnant again and requiring another abortion while in HHS custody.

Nor are Ms. Doe's injunctive claims saved from mootness because she filed this case as a putative class action. A class claim can survive after an individual named plaintiff's claim has become moot if the class is certified *before* the individual claim is mooted. See *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 398 (1980). Here, however, respondent filed a motion for class certification on October 18, and the district court had yet to rule when Ms. Doe's individual claim became moot on October 24. Pet. 19, 25. Respondent therefore contends (Br. in Opp. 19) that Ms. Doe's putative class claim is not moot because it is "inherently transitory." But that exception applies only where a claim is so fleeting that

"no plaintiff [will] possess[] a personal stake in the suit long enough" to obtain a decision on class certification. *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 76 (2013). As the government has explained (Pet. 26) (and respondent does not dispute), it is far from clear that the district court could not have ruled on *respondent's* motion for certification before Ms. Doe's interest would have expired in the ordinary course—much less that "no plaintiff" in the future would be able to litigate a challenge through a class-certification decision. 569 U.S. at 76.

c. Finally, respondent erroneously contends that the court of appeals' decision will not have any "legal consequences." Br. in Opp. 21-22 (citation omitted). To be clear, we agree that the decision neither establishes law of the case nor has any preclusive effect. See *id.* at 21. But the en banc court's order is a published decision effectively affirming the district court's order that the government immediately facilitate Ms. Doe's obtaining of an elective abortion. Absent vacatur, the decision will be binding within that circuit with respect to future requests for similar preliminary relief, absent any material factual differences,[4] and it plainly will have significant influence on permanent relief in this case and others. These are legal consequences that the government should not, in fairness, be forced to suffer. *Munsingwear*, 340 U.S. at 40-41.

2. With respect to disciplinary action, respondent does not dispute any of the key facts: (i) her counsel indicated to the government and the courts that the doctor available to Ms. Doe during the week of October 23

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[4] The district court already has relied on the decision to afford similar relief to two additional aliens in HHS custody. See Stay Appl. Addendum 144.

was not the doctor who had provided her prior counseling (and thus the new doctor would have to wait at least 24 hours after counseling to perform the abortion under Texas law); (ii) Ms. Doe's representatives *expressly told* the government that, when she did not receive counseling from the new doctor on Tuesday, October 24, she would not be able to undergo an abortion until Thursday, October 26; (iii) respondent's counsel *knew* that the government was relying on those representations when it delayed seeking emergency relief from this Court overnight on October 24; (iv) sometime after the government provided notice of its intent to file on the morning of October 25, Ms. Doe's representatives secured the services of the original doctor; and (v) they made no effort to correct their earlier statements.

Under Rule 8.2, this Court has the authority to "take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar." That standard is not tied to any State's ethical code or the Model Rules. See *In re Snyder*, 472 U.S. 634, 645 n.6 (1985). Rather, "'conduct unbecoming a member of the bar' is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice." *Id.* at 645 (interpreting the same language in Fed. R. App. P. 46). If respondent's counsel knowingly allowed the government to rely on statements that either respondent's counsel or Ms. Doe's ad litems deliberately rendered false, such conduct is fairly described as "inimical to the administration of justice."

The Model Rules lead to the same conclusion. Rule 4.1 provides that, "[i]n the course of representing a client a lawyer shall not knowingly * * * make a false

statement of material fact or law to a third person," Model Rules of Prof'l Conduct R. 4.1 (2017), and shall not, at any time, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," Model Rules of Prof'l Conduct R. 8.4(c) (2017). Although a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," misrepresentations can occur through "omissions that are the equivalent of affirmative false statements." Model Rules of Prof'l Conduct R. 4.1 cmt. 1 (2017). Even when a lawyer makes a representation he reasonably believes is true when made, an "obligation to disclose * * * ordinarily arises" if the lawyer subsequently discovers the statement to be false. Restatement (Third) of the Law Governing Lawyers § 98 cmt. d (1998). Respondent points to no legitimate reason why these basic principles should not apply here.

Respondent contends (Br. in Opp. 30) the government should have obtained a "clear commitment" that Ms. Doe would not obtain an abortion procedure before the government sought a stay on the morning of October 25. Respondent's contention both ignores critical facts and is legally irrelevant. First, government counsel asked to be kept informed of the timing of Ms. Doe's procedure, and in context the response—"[a]s soon as we understand the clinic's schedule tomorrow we will let you know"—indicated that respondent's counsel would keep the government informed as to the timing of the procedure, not some mundane fact like what hours the clinic would be open. Pet. 13, 27. Second, respondent does not dispute that Ms. Doe's attorney ad litem told the government an abortion could not take place until October 26—a representation that could not have been clearer. Pet. 13. Third, after the government informed

respondent's counsel of its intentions, one of respondent's attorneys expressed relief that he would not need to "check [his] email at 2 a.m.," Resp. Ex. 1 (lodged with the Court), confirming that he knew the government was relying on his co-counsel's representations about the timing of the abortion. Even in the absence of a "direct inquiry" from opposing counsel, an attorney's silence can be equivalent to a misleading statement where it is "obvious that [the opposing party] [i]s acting under a misapprehension," 2 Geoffrey C. Hazard, Jr. et al., *The Law of Lawyering* § 40.04, at 40-13 (2015) (Hazard); see *id.* § 40.03, at 40-10, particularly where it is *the attorney's own conduct* that created the misimpression.

Respondent insists that her counsel had an obligation "zealously to protect and pursue [her] legitimate interests" and to maintain client confidentiality. Br. in Opp. 31 & n.18 (citation omitted). But "Model Rule 4.1(a) is not qualified or 'trumped' by reference to the confidentiality principle set forth in Rule 1.6." Hazard § 40.03, at 40-12; see *id.* § 40.03, at 40-10 (The "view that confidentiality is absolute" is "discredited," "goes too far, and is contrary to * * * the law of lawyering."). To be clear, the government is not arguing that respondent's counsel had "a duty to forbear from effectuating" the district court's amended TRO as rapidly as possible. Br. in Opp. 30. Rather, they had a duty not to inform the government (and otherwise lead the government to believe) that the court's order could not be effectuated before October 26; know that the government was relying on those representations; and then actively work to render those representations false in order to prevent this Court's review.

To take an analogous example, consider if government counsel informed opposing counsel that the unavailability of a particular drug would prevent the government from carrying out an execution until some future date, but after learning that the prisoner planned to file an emergency stay application, government counsel undertook extraordinary efforts to obtain the drug and to carry out the execution sooner without notice to opposing counsel. The conduct would be no more becoming a member of the Bar of this Court because the government's statements to counsel were accurate when made, see Br. in Opp. 23; the government never "forsw[o]r[e]" a different course of action, see *id.* at 25; and nothing prevented counsel from extracting more explicit commitments rather than taking the government at its word, see *id.* at 29. Members of the Bar of this Court, particularly in the context of emergency proceedings, often rely on—and should be safe in relying on—the duty of counsel to update statements that have become materially false, let alone as a result of counsel's own conduct.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand to the district court for dismissal of all of Ms. Doe's claims for prospective relief regarding pregnant unaccompanied minors.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2017

No. 17-654

IN THE

Supreme Court of the United States

ERIC D. HARGAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF *AMICUS CURIAE* LEGAL CENTER FOR DEFENSE OF LIFE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgment and instruct that court to remand the case to the district court with directions to dismiss all claims for prospective relief regarding pregnant unaccompanied minors.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1989, *amicus curiae* Legal Center for Defense of Life ("Legal Center") is a nonprofit New Jersey corporation dedicated to defending constitutional rights of those who advocate on behalf of unborn children, and the interests of the unborn themselves. The Legal Center includes a network of

[1] *Amicus* files this brief after providing the requisite ten days' prior written notice and receiving written consent by all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

attorneys who together have volunteered thousands of hours of *pro bono* services in defense of pro-life advocates.

The Legal Center has a direct and vital interest in opposing the creation of a new constitutional right to abortion by illegal aliens, and in defending the orderly administration of justice when this issue is in dispute, as in this case.

SUMMARY OF ARGUMENT

Illegal aliens do not have a constitutional right to enter the United States to have an abortion, or to obtain an abortion while remaining here illegally. Moreover, no one has a right to compel the federal government to be complicit in the procurement of an abortion. The terse *en banc* judgment below is in error on both fundamental principles of law. The Petition should be granted to vacate the judgment or correct these significant errors of national importance.

At a minimum, as argued by the United States here, the decision below should be vacated as moot. (Pet. 20-24, relying on *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), and similar authorities). In addition, this Court should recognize that the decision below was a radical departure from the decisions of this Court, which is an independent basis for granting *certiorari*. Neither the Constitution nor even judge-made law supports what the D.C. Circuit *en banc* implicitly held below in compelling the federal government to be complicit in an abortion by an illegal alien in Texas. If not vacated or reversed, it is likely there will be attempts to use the decision below as an improper precedent nationwide. The supervisory role

of this Court requires reversal of these substantial errors before they propagate further.

In addition, this Court should disapprove with discipline the legal tactics used below in obtaining an abortion in the middle of the night – scheduled at 4:15 a.m. (Pet. 11) – timed to thwart orderly review by this Court. That conduct increased the medical risks to the 17-year-old girl J.D., and infringed on her right to fully informed consent. Such legally motivated tactics are below the standards of this Court and the legal profession, and should be chastised accordingly.

The Solicitor General's Petition for a Writ of Certiorari should be granted because the decision below cannot stand, and the legal tactics used to disrupt the orderly administration of justice should not go unpunished.

ARGUMENT

I. THE DECISION BELOW ERRONEOUSLY DECIDED IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

This Court has been clear that the federal government can prefer childbirth over abortion, and thus there is no constitutional right for anyone to compel complicity by the federal government in obtaining an abortion. In the case of seeking an abortion for an illegal alien held in federal custody, such complicity is inherently sought by the attempt itself. The decision below squarely conflicts with the fundamental principle of abortion jurisprudence that

the federal government can side completely with childbirth rather than abortion.

Moreover, illegal aliens do not have a right to have an abortion in the United States. Yet the decision below implicitly and improperly invented such a new right where none exists.

A. The Decision Below Erred in Compelling Complicity by the Federal Government in Procuring an Abortion.

"[A] State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." *Planned Parenthood v. Casey*, 505 U.S. 833, 886 (1992). This concept is central to the longstanding precedent that the federal government may fund the costs of childbirth while refusing to fund expenses relating to abortion. *See Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Congress has [properly] established incentives that make childbirth a more attractive alternative than abortion.").

Despite this, a concurring opinion below stated that:

> What is forcing J.D. to carry on this pregnancy is not J.D.'s choice. It is not Texas law. It is the federal government's refusal to allow an abortion to go forward. The government's refusal to release J.D. from custody is not just a substantial obstacle; it is a full-on, unqualified denial of and flat prohibition on J.D.'s right to make her own reproductive choice.

(Pet. App. 8a, Millett, J., concurring).

In fact no one, and certainly not the federal government, has been depriving J.D. of her full ability

to end her illegal presence in this country by simply returning home. J.D. entered here illegally against the will of the United States government and contrary to applicable law. She has been able to leave this country at any time. It would be as though someone had entered a religious hospital that declines to perform abortions and then refuses to leave until she obtains one at that hospital. The Constitution does not compel a religious hospital – or the United States government – to be complicit in a sought-for abortion.

B. The Decision Below Erred in Assuming an Illegal Alien Has a Right to an Abortion.

The United States is not a sanctuary for all foreigners who want an elective abortion, particularly when the laws of their home country prohibit it, as in this case. Yet that is the basis of the ruling below, in assuming that a foreigner who was eight weeks pregnant when she illegally entered the United States somehow has a constitutional right to obtain abortion here. J.D. is a trespasser on American soil, and has no legitimate right to demand an abortion here.

An illegal alien has a status no greater than that of a trespasser at common law, who may be properly detained and restricted in movement, especially if the trespasser is unwilling to leave. A landowner who restricts the movement of a defiant trespasser is not liable for false imprisonment. *See, e.g., Prinz v. Greate Bay Casino Corp.*, 705 F.2d 692, 694 (3d Cir. 1983) ("If he could not lawfully remain there was probable cause for his detention as a defiant trespasser, which in New Jersey is a defense to a charge of false imprisonment.").

Most other countries of the world properly have laws against abortion, in contrast with the framework

of unlimited abortion in the United States as established in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). Elective abortion is illegal in the country from which J.D. came. (Pet. 37a) Indeed, elective abortion is properly illegal in much of Central and South America. *See, e.g.*, Johanna Zacarias, Note: "Suffering in Silence: The Urgent Need to Address El Salvador's Lack of Reproductive Rights," 47 Geo. Wash. Int'l L. Rev. 233, 239 (2015) ("After April 20, 1998, all abortions - including those which were previously allowed - were criminalized and [t]he abortion provisions were placed in a new section of the Penal Code that details offenses against the 'human life in formation.'").

Middle Eastern countries likewise have laws against abortion that are stricter than in the United States. In Israel, for example, abortion is allowed only if there is an application to and approval by a Pregnancy Termination Committee, and "as of 1993, legal access to abortion had been narrowed through stricter limitations on the discretion of" those committees to approve abortion. Noya Rimalt, "When Rights Don't Talk: Abortion Law and the Politics of Compromise," 28 Yale J.L. & Feminism 327, 355 (2017). Respect for abortion laws in other nations should benefit from the same level of international comity that other legal issues receive, such as the matter of personal jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (reversing the Ninth Circuit for having "paid little heed to the risks to international comity its expansive view of general jurisdiction posed").

In *Plyler v. Doe*, a 5-4 Supreme Court ruled that children of illegal aliens have a constitutional right to attend public schools free of cost, and that this right cannot be denied by States. But J.D. is an illegal alien herself, and the rationale in *Plyler* does not apply to the issue of whether an illegal alien herself has a right to an abortion:

> ***Persuasive arguments support the view that a State may withhold its beneficience from those whose very presence within the United States is the product of their own unlawful conduct.*** These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation.

Plyler v. Doe, 457 U.S. 202, 219-20 (1982) (emphasis in original). Here illegally herself, J.D. has no right to a free public education under the *Plyler* decision, and she has no constitutional right to an abortion in Texas.

II. THE HURRIED, MIDDLE-OF-THE-NIGHT ABORTION INCREASED MEDICAL RISK, UNDERMINED INFORMED CONSENT, AND IS A BLIGHT ON THE ORDERLY ADMINISTRATION OF JUSTICE.

The hurried, middle-of-the-night[2] abortion put a 17-year-old girl at heightened medical risk, and

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[2] The abortion was scheduled for 4:15 a.m. (Pet. 11)

deprived her of fully informed consent for the life-changing procedure. Even many who support legalized abortion would agree that the circumstances and timing of the abortion below are not a proper way to terminate a pregnancy or resolve an ongoing legal dispute about one. What transpired in this case is a blight on the orderly administration of justice, and might be characterized by a future observer as uncivilized.

Had a State hurriedly executed a prisoner in the middle of the night to avert review by this Court, there is little doubt that this Court would harshly and unanimously condemn it. Such chicanery is even less appropriate in the context of an abortion, where fully informed consent by the patient, without any time pressures, is essential.

A. Risk of Medical Harm Was Increased by the Middle-of-the-Night Abortion.

Elective surgery is more dangerous when conducted in the middle of the night, for obvious reasons. Surgeons are more likely to be fatigued, and less support staff is typically available both to assist in the procedure and to address complications. The patient herself may be more fatigued. Whatever the causes, night surgery is widely known to carry an increased risk of medical harm to the patient. *See, e.g.*, "Night Surgeries Linked to Risks," Business Daily (Oct. 17, 2017) (study of 15,000 surgeries showed a massive 50% increase in complications when done between the hours of 9pm and 7am).[3]

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[3] https://www.msn.com/en-za/news/other/night-surgeries-linked-to-risks/ar-AAtFk2q (viewed 11/26/17).

Research shows that sleep deprivation is as harmful to clinical performance as alcohol intoxication is, and experts advise against performing elective surgery under such circumstances:

> Sleep deprivation adversely affects clinical performance and impairs psychomotor performance as severely as alcohol intoxication.

Michael Nurok, M.D., Ph.D., Charles A. Czeisler, Ph.D., M.D., and Lisa Soleymani Lehmann, M.D., Ph.D., "Sleep Deprivation, Elective Surgical Procedures, and Informed Consent," N. Engl. J. Med. 2010; 363:2577-2579 (Dec. 30, 2010).[4]

The rushed, middle-of-the-night abortion on J.D. put her at unjustified medical risk. It may not be known for years if her cervix was damaged by the procedure, thereby causing her problems with future pregnancies. Complications from abortion include both immediate harm and long-term effects. In addition she may be scarred psychologically by the inherently frightening timing of the procedure. Patients to be seen the following day by the same practitioners were also jeopardized, given that the sleep deprivation is as deleterious as intoxication.

For legal advantage, a foreign 17-year-old girl was subjected to increased risk to her health, in order to establish an ideologically motivated precedent. Regardless of whether J.D. or ensuing patients suffered actual harm, an attempt at legal advantage does not justify inflicting greater medical risk on a minor.

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[4] http://www.nejm.org/doi/full/10.1056/NEJMp1007901 (viewed 11/23/17).

B. The Right to Revoke Consent Is Deprived by a Time-Pressured, Middle-of-the-Night Abortion.

A woman's right to revoke consent remains essential until the abortion begins, and she has a right to have full clarity of thought until that life-changing moment. Even in the context of capital punishment, where no consent is required, this Court has prohibited executions where there are doubts about the lack of clarity of mind. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) (overturning capital punishment where doubts were raised about the mental clarity of the subject, observing that "'the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.' The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it.") (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986)).

Had J.D. confessed to a crime under circumstances similar to how the abortion was performed, her confession would likely be deemed non-consensual and inadmissible. The Ninth Circuit held as follows:

> Commencing the interrogation of a teenager after midnight, and pressing it past 3:00 a.m., absent some showing that delay would risk the destruction of evidence or other such harm, creates far too great a risk that a false confession will be extracted, leading to the unjust conviction of an innocent person.

Taylor v. Maddox, 366 F.3d 992, 1013 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004).

J.D. was merely 17 years old while in a land foreign to her, and one can only wonder what she was told to explain why the abortion was being done in the middle of the night. This Court held the following about an interrogation of a 15-year-old boy in "the dead of night":

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition.

Haley v. Ohio, 332 U.S. 596, 599 (1948).

It is plausible, even likely, that J.D. did not feel she had much of a choice to decline the middle-of-the-night abortion, or to request more time to reconsider whether to have it. She was probably told it was necessary to have it done immediately, and she may have felt she did not have a right to change her mind. That is not true consent, and that is inconsistent with the applicable Texas law requiring informed consent after counseling. See Pet. 69a, ¶ 6 (referencing application of Texas's "state-mandated counseling" requirement).

C. The Abortion Violated the Orderly Administration of Justice.

Zealous representation should end where unnecessary risks to health and safety begin, particularly for a minor such as J.D. Moreover, the orderly administration of justice depends on respect by

officers of the court – its licensed attorneys – for legal procedure. Deference to the orderly procedure of this Court was lacking in the rushed abortion below.

Were this a case of capital punishment rather than an abortion dispute, there is little doubt that this Court would discipline any attorney who arranged for a surprise execution by a State in order to deny this Court full review of the issue. The integrity of legal process suffers if such conduct goes unaddressed. Indeed, it is difficult to see why such conduct would not be repeated in future cases, if there is no sanction of it here.

"An attorney acts not only as a client's representative, but also as an officer of the court, and has a duty to serve both masters." *Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 564 (1991). The conduct in procuring the middle-of-the-night abortion, as recounted by Petitioner (Pet. 10-17), does not comport with the obligations of an attorney to serve as an officer of the Court.

In both *Roe v. Wade* and *Doe v. Bolton*, the plaintiffs opposed or regretted positions that their attorneys took. In *Doe*, the plaintiff Sandra Cano later testified before the United States Senate Committee on the Judiciary that she never even sought an abortion:

> I only sought legal assistance to get a divorce from my husband and to get my children from foster care. I was very vulnerable: poor and pregnant with my fourth child, but abortion never crossed my mind. Although it apparently was utmost in the mind of the attorney from whom I sought help. ***At one point during the legal proceedings, it was necessary for me to flee to Oklahoma to avoid***

> ***the pressure being applied to have the abortion scheduled for me by this same attorney***. Please understand even though I have lived what many would consider an unstable life and overcome many devastating circumstances, at NO TIME did I ever have an abortion. I did not seek an abortion nor do I believe in abortion.

Linda L. Schlueter, "40th Anniversary of Roe v. Wade: Reflections Past, Present and Future," 40 Ohio N.U.L. Rev. 105, 122-123 (2013) (quoting the Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights, of the S. Judiciary Comm., 109th Cong. (2005), statement of Sandra Cano, emphasis added).

As to the "Roe" in *Roe v. Wade*, the plaintiff Norma McCorvey later brought a lawsuit in an attempt to reverse the outcome that had supposedly been in her favor. While this Court declined to review her appeal, Judge Edith Jones on the Fifth Circuit remarked on how "the Court will never be able to examine its factual assumptions on a record made in court." *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring), *cert. denied*, 543 U.S. 1154 (2005). "Thus, the 'facts' that gave rise to the cases of *Roe v. Wade* and *Doe v. Bolton* were based on lies and deception." Schlueter, *supra* at 123.

There are necessary limits to zealous representation. "The obligations owed by the attorney to the client are defined by the professional codes, not by the ... entity from which ... compensation is derived." *Polk Cty. v. Dodson*, 454 U.S. 312, 327 (1981). Subjecting a 17-year-old foreign girl to heightened medical risk, and depriving her of her full right to revoke consent, in a rushed elective medical

operation timed to deprive this Court of jurisdiction, transgresses those limits. Such conduct interfered with the orderly administration of justice in a shocking manner, and should be addressed accordingly by this Court.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, it should be granted.

Respectfully submitted,

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Dated: November 30, 2017

No. 17-654

In the Supreme Court of the United States

ERIC D. HARGAN, ET AL., PETITIONERS

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Arkansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.[1] The States have an interest in cooperating with the federal government to establish a consistent and correct understanding of the rights of aliens unlawfully present in the United States, as the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). The States also have "a legitimate and substantial interest in preserving and promoting fetal life," as well as an "interest in promoting respect for human life at all stages in the pregnancy." *Gonzales v. Carhart*, 550 U.S. 124, 145, 163 (2007).

In this case, the district court entered—and the en banc court of appeals sustained—a temporary restraining order effectively declaring that the U.S. Constitution confers on unlawfully-present aliens the right to an elective abortion that is not medically necessary—even when they have no ties to this country other than the fact of their arrest while attempting to cross the border unlawfully. As far as amici can ascertain, no court has ever before recognized such

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[1] Pursuant to Supreme Court Rule 37.2, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici contributed monetarily to the preparation or submission of this brief. The parties' consents to the filing of this brief have been filed with the Clerk.

broad rights for unlawfully-present aliens with virtually no connections to the country. Under the reasoning of the courts below, there will be no meaningful limit on the constitutional rights an unlawfully-present alien can invoke simply by attempting to enter this country. This relief also contradicts the Court's longstanding precedent that full Fifth Amendment rights accorded to citizens can only be extended to those aliens who "have come within the territory of the United States and *developed substantial connections with this country.*" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added).

Amici thus urge the Court to vacate the court of appeals' judgment.

SUMMARY OF ARGUMENT

The decisions below are unprecedented. Until now, no court had ever declared that the Constitution gives unlawfully-present aliens with virtually no ties to this country the full scope of affirmative liberty rights accorded to citizens. The district court and the en banc court of appeals thus broke new ground by holding that an unlawfully-present alien with virtually no ties to this country has a constitutional right to an elective abortion.

This Court should vacate the court of appeals' order because the Constitution does not confer the right to an elective abortion on unlawfully-present aliens with virtually no ties to the country, as Judge Henderson's dissent below rightly concluded. Under long-settled doctrine, the constitutional rights an alien may invoke depend on the scope of the alien's ties to this country. It is true that all persons—regardless of immigration status, and regardless of their ties here—have certain cabined constitutional rights, including baseline procedural protections and the right to be free from gross physical abuse. But that does not mean that such unlawfully-present aliens are accorded the panoply of affirmative liberty rights that citizens and lawfully-present aliens possess.

The States—and the State of Texas in particular—are already spending enormous resources dealing with unlawful immigration. The court of appeals' decision, though, creates a perverse incentive to unlawfully enter the country. This will further add to the substantial burden faced by the governmental entities trying to prevent and deal with unlawful immigration.

ARGUMENT

I. Unlawfully-Present Aliens with Virtually No Connections to the United States Have No Constitutional Right To An Elective Abortion.

The Court should vacate the decision below because the right asserted does not exist: Unlawfully-present aliens with virtually no connections to the country do not have a constitutional right to an elective abortion. The district court necessarily erred in entering—and the en banc court of appeals erred in upholding—the temporary restraining order. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008) (preliminary injunctive relief unavailable if the plaintiff cannot establish a likelihood of success on the merits); *Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (per curiam) (same).

A. The Decisions Below Overrode This Court's Long-Settled "Substantial Connections" Test, Which Provides That the Degree of Connections to This Country Determines the Degree of Fifth Amendment Rights Accorded to Aliens.

The "initial inquiry" in assessing any due process claim is whether the Constitution protects the right the plaintiff asserts. *See, e.g.*, *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976). Only after confirming that the right at issue exists should a court move on to whether the government has violated that right. *See id.* The courts below thus should have begun their analysis by asking whether the right to an elective abortion recognized by this Court applies to unlawfully-present aliens with virtually no connections to this country who were apprehended while attempting to cross the border.

The answer to that question, as Judge Henderson correctly concluded, is "plainly—and easily—no." Pet. App. 35a.

1. The Constitutional Rights of Aliens are Determined by a Sliding Scale Based on the Degree of Connections the Alien Has to the Country.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." This Court has held that unlawfully-present aliens are "persons" protected by the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Court reiterated in 2001 that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).[2]

But simply because an individual is a "person" covered by the Fifth Amendment, it does not follow that the alien is necessarily "due" the same scope of rights accorded to citizens or lawfully-present aliens. This Court has held that the rights an alien is "due" depend on the connections that person has established with this country: *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990), clarified that *Plyler*'s Fifth Amendment analysis "establish[es] only that aliens receive constitutional protections when they have come within the territory of

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[2] Contrary to the statements in the panel dissent below, amici did not argue that unlawfully-present aliens are not "persons." *Cf.* Pet. App. 16a.

the United States *and developed substantial connections with this country*." *Id.* at 271 (emphasis added).

Verdugo-Urquidez emerged from this Court's bedrock rule that an alien is "accorded a generous and ascending *scale of rights* as he increases his identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (emphasis added). In other words, as set out first in *Eisentrager* and explained by *Verdugo-Urquidez*, an alien's connections determine the scope of rights the alien is due. *See id.* As a person develops increasing connections with this country, the person's constitutional protections expand. *E.g.*, *Verdugo-Urquidez*, 494 U.S. at 268-69; *see also Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (staying injunction of immigration order for aliens "who lack any bona fide relationship with a person or entity in the United States"). Initial lawful entry affords "safe conduct" and confers "certain rights," which "become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." *Eisentrager*, 339 U.S. at 770; *see Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (alien's "constitutional status changes" only after he "gains admission to our country and begins to develop the ties that go with permanent residence").

No decision of this Court or any other court has abrogated that basic *Eisentrager/Verdugo-Urquidez* framework of a sliding scale of rights based on the degree of connections the alien has to the country. In particular, *Zadvydas* did not alter or undermine *Verdugo-Urquidez*'s pronouncement that to invoke the full scope of Fifth Amendment rights, an unlawfully-present alien

must demonstrate "substantial connections." *See, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (applying "significant voluntary connection" test from *Verdugo-Urquidez*); *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016) (same). In fact, *Zadvydas* expressly limited its analysis to "aliens who were admitted to the United States but subsequently ordered removed." 533 U.S. at 682 (emphasis added). By contrast, "[a]liens who have not yet gained initial admission to this country would present a very different question." *Id.*

2. Unlawfully-Present Aliens With Virtually No Connections to the Country Lack the Panoply of Affirmatively Liberty Rights that Citizens and Lawfully-Present Aliens Possess, Although They Do Have Baseline Procedural Protections and the Right to be Free from Gross Physical Abuse.

a. The sliding-scale approach set out in *Eisentrager* and *Verdugo-Urquidez* recognizes that it is the rare exception where constitutional rights are accorded to unlawfully-present aliens with minimal connections to the country. Under that rare exception, the mere fact of presence in this country—even unlawful presence—does confer certain baseline constitutional rights against egregious harm, but not affirmative liberty rights. And even when certain limited constitutional rights are extended to unlawfully-present aliens, courts routinely hold that the full scope of a constitutional provisions' rights do not extend to such aliens.

For example, mere unlawful presence confers a basic right against "gross physical abuse" in this country. *Castro v. Cabrera*, 742 F.3d 595, 600 (5th Cir. 2014) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987)). The Constitution protects everyone on U.S. soil, even unlawfully-present aliens with no other ties to this country, against the "wanton or malicious infliction of pain" by governmental officials. *Id.*

The panel dissent—which the en banc majority below "substantially" adopted, Pet. App. 19a—argued that amici's position would mean that the alien here and "everyone else here without lawful documentation—including everyone under supervision pending immigration proceedings and all Dreamers—have no constitutional right to bodily integrity in any form (absent criminal conviction)." Pet. App. 16a. But that does not follow from amici's position, and this Court's precedents do not lead to that drastic outcome. The "deeply troubling" hypotheticals the panel dissent posited are thus fully resolved by a proper application of the *Eisentrager/Verdugo-Urquidez* framework. *Cf.* Pet. App. 16a.

Under the "ascending scale" of rights articulated in *Johnson* (339 U.S. at 770), reinforced in *Landon* (459 U.S. at 32), restated in *Verdugo-Urquidez* (494 U.S. at 268-69)—and applied in *Lynch* (810 F.2d at 1370) and *Castro* (742 F. 3d at 600)—all persons on U.S. soil are constitutionally protected against "gross physical abuse." *Castro*, 742 F.3d at 600. However, even though the Constitution confers basic protection against gross physical abuse, full Fourth Amendment rights accorded to citizens do not apply to unlawfully-present aliens with

only minimal connections to the country. *See, e.g.*, *Castro*, 742 F.3d at 599-600 (Fourth Amendment does not extend to unlawfully-present aliens who remain in the United States illegally, unless they are raising claims of "gross physical abuse"); *United States v. Vilches-Navarrete*, 523 F.3d 1, 13 (1st Cir. 2008) (criminal defendant lacked "substantial connection" with U.S. necessary to invoke Fourth Amendment protection under *Verdugo-Urquidez*).

In addition to the gross-physical-abuse prohibition, the mere fact of presence in this country—even unlawful presence—also confers a certain set of basic procedural guarantees before the federal government can deport the individual. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) (it is "well established" that aliens have due-process rights in deportation hearings). But even then, the full scope of procedural due process rights guaranteed to citizens does not extend to unlawfully-present aliens. *See, e.g.*, *id.* at 521 ("'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976))); *accord, e.g.*, *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens, however." (citing *Mathews*, 426 U.S. at 79-80)).

In sum, the fact that basic procedural safeguards and protections against "gross physical abuse" are afforded to everyone on U.S. soil does not mean that the full panoply of constitutional rights accorded to citizens extends

to each unlawfully-present alien with only minimal connections to the country. *See Verdugo-Urquidez*, 494 U.S. at 268-69.

b. Furthermore, courts routinely hold that unlawfully-present aliens with minimal connections to the country lack affirmative liberty rights.

For example, numerous courts have held that unlawfully-present aliens with minimal connections to the country do not have the Second Amendment "fundamental right" (*McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)) to keep and bear arms. *United States v. Portillo–Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) as revised (June 29, 2011); *United States v. Carpio–Leon*, 701 F.3d 974, 979 (4th Cir. 2012); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam); *cf. Meza-Rodriguez*, 798 F.3d at 669-672 (unlawfully-present alien had Second Amendment rights only because he arrived in the U.S. at a young age and lived here for 20 years).

And full First Amendment rights do not extend to unlawfully-present aliens without substantial connections to the country. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (noting federal statute, now codified at 52 U.S.C. §30121, prohibiting "foreign national[s]" from making direct contributions or independent expenditures for political speech); *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (alien may be returned to home country for engaging in disfavored political speech in this country); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (government may restrict alien's freedom of association).

The Department of Justice has explicitly advanced this view in previous litigation. *See* Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for

TRO at 13, *Pineda-Cruz v. Thompson*, No. 5:15-cv-00326 (W.D. Tex. May 7, 2015) (Dkt. 22) ("Because Plaintiffs never gained entry into the United States and have not developed substantial connections with this country, they are not within the scope of individuals contemplated by the Supreme Court as being able to raise claims under the First Amendment."). In fact, the federal government has, on dozens of occasions, argued that unlawfully-present aliens lack the full scope of constitutional rights afforded to citizens. *See infra* Part II.B.2.

These principles establishing that unlawfully-present aliens lack affirmative liberty rights held by citizens comport with this Court's declaration that aliens subject to deportation may be detained as their deportation is processed. *See, e.g.*, *Kim*, 538 U.S. at 523 ("At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process."). With physical detention necessarily comes a restriction of liberties.

c. The affirmative substantive due process right recognized by the Court to seek the medical procedure of an elective abortion is much more analogous to the affirmative liberty rights courts have repeatedly held are not accorded to unlawfully-present aliens who lack substantial connections to the country. In contrast, baseline procedural safeguards and the basic protection against gross physical abuse are negative prohibitions on drastic government conduct (detention and removal without any process, and gross physical abuse).

Respondent has never offered any authority to the contrary. In the proceedings below, respondent argued that the alien's immigration status has no impact at all

on the constitutional rights she may assert. That is wrong, as the authorities above confirm. Moreover, the authorities respondent relied on below do not establish the right to an elective abortion.

Respondent relied on various abortion cases, including *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality op.), for the proposition that "the government may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for Preliminary Injunction, *Garza v. Hargan*, No. 1:17-cv-02122 (D.D.C. Oct. 14, 2017) Dkt. 3-2 at 9-10 (citing *Casey*, 505 U.S. at 871 (plurality op.); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976), and *Bellotti v. Baird*, 443 U.S. 622, 633 n.12 (1979)). But not one of respondent's cited cases says or implies that the substantive due process right to abortion recognized by this Court extends to unlawfully-present aliens—especially not those who have no ties to this country.

Respondent further offered a string citation of cases, but none of those cases support the proposition that unlawfully-present aliens have the right to an elective abortion. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 187 (D.D.C. 2015), for example, concerned whether the government could continue to detain asylum applicants after those individuals had demonstrated a credible fear of persecution. Each of the applicants had family members in the United States who had agreed to provide shelter and support for the asylum-seekers. On those facts, and in

light of the plaintiffs' threshold showing of asylum eligibility, the district court held that they could invoke the protection of the Due Process Clause. Here, the operative complaint says nothing about asylum, alleges no connection to the U.S. at all, and offers no basis to believe that the alien is on track to permanent residence.

Respondent's other authorities fare no better. Respondent claimed the alleged abortion right was derived from *Plyler*, 457 U.S. at 210. But as explained above, this Court explicitly clarified and supplanted *Plyler* in *Verdugo-Urquidez*, 494 U.S. at 270-71. So too with *Mathews*, 426 U.S. at 77, which concerned *resident* aliens who were lawfully admitted to the United States; plus, *Mathews* too was clarified and supplanted by *Verdugo-Urquidez*. And *Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004), concerned an alien who had been *lawfully* present in the U.S. for almost two decades—in other words, someone who had established "substantial connections" under *Verdugo-Urquidez*.

In short, none of respondent's cited authorities support the extraordinary constitutional holding in the courts below.

B. The Operative Complaint Confirmed that the Alien At Issue Here Had No "Substantial Connections" to This Country, and Therefore Had No Right to an Elective Abortion.

The operative Complaint (Dist. Ct. Dkt. 1) confirmed that that alien here had no other connection to the United States:

- Paragraphs 4 and 5 summarized the aliens' situation but offered no allegations establishing a connection to the United States other than her unlawful presence.
- Paragraph 13 alleged: "J.D. was detained by the federal government and placed in a federally funded shelter in Texas. J.D. is years [sic] old, pregnant, and told the staff at the shelter where she is currently housed that she wanted an abortion." This paragraph admitted that the alien entered the United States unlawfully but offered no allegations establishing a connection to the United States.
- Paragraphs 14 and 15 discussed the alien's efforts to obtain an abortion during her time in custody.
- Paragraphs 33, 34, 35, 36, and 43 alleged that the defendants restricted the alien's ability to receive an abortion in the United States.

The alien even admitted below that that she has "no legal immigration status." Declaration, Dist. Ct. Dkt. 3-2 at 3. And the declaration that the alien submitted in support of her motion for a temporary restraining order confirmed no substantial ties to this country: The alien explicitly admitted she was "detained upon arrival." Dist. Ct. Dkt. 3-3 ¶ 4.

Those undisputed facts should have resolved this case "plainly" and "easily," as Judge Henderson recognized below. Pet. App. 35a. Under *Verdugo-Urquidez*, the alien must show "substantial connections" to assert full Fifth Amendment affirmative liberty rights. 494 U.S. at 271. She did not do so. *See* Dist. Ct. Dkt. 1. She thus stands at

the start of the "ascending scale of rights" that individuals climb as they "increase[] [their] identity with our society." *Eisentrager*, 339 U.S. at 770. At that level, the Constitution protects her against "gross physical abuse" in this country. *Castro*, 742 F. 3d at 600. The Constitution further confers some basic procedural guarantees related to her deportation proceedings. *Kim*, 538 U.S. at 523. But as *Verdugo-Urquidez*, *Eisentrager*, and *Kim* confirm, it does not accord the affirmative liberty right to an elective abortion.

II. The Court of Appeals Did Not Even Cite This Court's "Substantial Connections" Test, Which Is Well Accepted.

The court below entirely overlooked the bedrock principles articulated in *Eisentrager* and *Verdugo-Urquidez*, even though those principles confirm that an unlawfully-present alien with virtually no ties to this country has no right to an elective abortion. That "initial inquiry," *Meachum*, 427 U.S. at 223-24, appears nowhere in any decision below. The fact that the court of appeals not only reached the wrong result, but also applied the fundamentally wrong framework, is further grounds to vacate its judgment. *See United States v. Munsingwear*, 340 U.S. 36, 40-41 (1950).[3]

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[3] Amici fully briefed this *Verdugo-Urquidez* framework to the courts below. *See* Br. for Texas et al., *Garza v. Hargan*, No. 1:17-cv-02122-TSC (D.D.C.) (Oct. 17, 2017); Br. for Texas et al., *Garza v. Hargan*, No. 17-5236 (D.C. Cir.) (Oct. 19, 2017).

A. The Courts Below Had a Duty to Apply the Correct Law.

As Judge Henderson's dissent recognized, Pet. App. 35a, 42a, regardless of what the parties have argued, the court of appeals should have decided the predicate constitutional question before issuing such a momentous holding. *See, e.g., U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (if a party "fail[s] to identify and brief" "an issue 'antecedent to . . . and ultimately dispositive of' the dispute," an appellate court may consider the issue sua sponte (citation omitted)). After all, "even an explicit concession on this point would not "'relieve this Court of the performance of the judicial function'" of deciding the issues." *Torres v. Puerto Rico*, 442 U.S. 465, 471 n.3 (1979) (quoting *Sibron v. New York*, 392 U.S. 40, 59 (1968)). Moreover, a government's "concessions cannot be accepted" when they are contrary to law. *Massachusetts v. United States*, 333 U.S. 611, 625 (1948).

In short, regardless of what the parties argued, the court of appeals was still required to apply the correct legal framework. *See id.* Because the court of appeals' wholly incorrect framework is now law, it should be set aside.

B. The "Substantial Connections" Test Is Widely Cited and Applied as Controlling.

1. The court of appeals' failure here to address the *Verdugo-Urquidez* substantial-connections, sliding-scale test is particularly striking given that other circuits uniformly and routinely apply this controlling test when determining whether aliens can assert constitutional

rights. *E.g.*, *Meza-Rodriguez*, 798 F.3d at 670; *Ibrahim*, 669 F.3d at 995; *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012); *Portillo-Munoz*, 643 F.3d at 440; *Vilches-Navarrete*, 523 F.3d at 13; *Atamirzayeva v. United States*, 524 F.3d 1320, 1325 (Fed. Cir. 2008); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 202 (D.C. Cir. 2001).

As these citations demonstrate, the arguments amici and Judge Henderson advanced simply reflect basic principles that have governed the rights of aliens for decades.

2. In conformance with the circuits' widespread adherence to this Court's established precedent, the Department of Justice has relied on *Verdugo-Urquidez*'s substantial-connections test dozens of times to argue that unlawfully-present aliens without sufficient ties to the country lack constitutional rights.

Just months ago, the Department argued in this Court that:

> [A]n alien arrested shortly after crossing the U.S. border surreptitiously cannot lay the same claim to constitutional protections as aliens who were lawfully admitted or who entered illegally then became, "in a[] real sense, a part of our population[.]"

Brief for the Respondents in Opposition, *Castro v. Dep't of Homeland Sec.*, 137 S. Ct. 1581 (2017) (No. 16-812), 2017 WL 1046315, at *17.

That is not the only time this year that the Department made that argument in this Court. *See, e.g.*, Brief for the United States, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118), 2017 WL 104588 at *35 (arguing

that, under *Verdugo-Urquidez*, aliens are "afforded constitutional protections only when 'they ha[d] come within the territory of the United States and developed substantial connections with this country'"); Transcript of Oral Argument at 17, *Jennings v. Rodriguez*, No. 15-1204 (U.S. October 3, 2017) (Q: "is your argument about the new admits, the people who are coming to the border, premised on the idea that they simply have no constitutional rights at all?" A: "It is premised on that.").[4]

The Department has made similar arguments in the Fifth Amendment context in other courts. *E.g.*, Reply in Support of Appellants' Brief, *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) (No. 17-55208), 2017 WL 1055525, at *13 n.6 ("Aliens identified at the border who have not had any contact with the United States—even if they are subsequently paroled into the territorial United States during the resolution of their applications for admission—are not entitled to any process other than that provided by statute."); Brief for Appellee, *United States v. Kole*, 164 F.3d 164 (3d Cir. 1998) (No. 96-5457), 1996 WL 33453512, at *24 ("the Constitution was 'not intended to extend to aliens in the same degree as to citizens'"); Brief for Respondent, *Wigglesworth v. I.N.S.*, 319 F.3d 951 (7th Cir. 2003) (No. 02-1209), 2002 WL 32170294, at *19-*21 ("In order for the due process clause to apply, there must be an identifiable life, liberty or property interest. It is clear that any liberty interest [petitioner] may have

[4] The Department later modified its response to suggest that aliens might have *some* rights (which is also consistent with amici's position, as explained above), but certainly not the full scope afforded citizens. Tr. at 17-18.

in this regard is so weak that she clearly has no right to a hearing before an immigration judge...[petitioner] is not a permanent resident of the United States or even a temporary resident.").

And the Department has explicitly relied on the *Eisentrager* "ascending scale" analysis to argue against expanded due process rights for unlawfully-present aliens. *E.g.*, Brief for Appellee United States, *United States v. Raya-Vaca*, 771 F.3d 1195 (9th Cir. 2014) (No. 13-50129), 2013 WL 6221846, at *13–15 ("[T]here has long been a sliding-scale approach to determining the rights to be afforded to aliens by the Due Process Clause. Under that approach, aliens generally enjoy more rights as a function of their legality/longevity in this country. On one end of the scale is the undocumented alien; in the middle is the lawful permanent resident; and at the opposite end is the naturalized citizen. As an alien moves from one end of the scale to the other, his rights increase . . ."); Brief for Defendant-Appellee Robert S. Mueller, *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008) (No. 06-4216-CV), 2007 WL 7285642 at * 32-33 (similar); Brief for Cross-Appellees and Reply Brief for Appellants, *Gutierrez v. Ashcroft*, 125 F. App'x. 406 (3d Cir. 2005) (Nos. 03-4798, 04-1031), 2004 WL 4184747, at *16, 20 (similar).

Even beyond the due-process context, the Department has invoked *Verdugo-Urquidez*'s substantial-connections test to argue against various other constitutional rights for aliens without sufficient ties to the country:

- *First Amendment. E.g.*, Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for TRO at 13, *Pineda-Cruz v. Thompson*, No.

5:15-cv-00326 (W.D. Tex. May 7, 2015) (Dkt. 22) ("Because Plaintiffs never gained entry into the United States and have not developed substantial connections with this country, they are not within the scope of individuals contemplated by the Supreme Court as being able to raise claims under the First Amendment.").

- *Second Amendment. E.g.*, Brief for the United States as Appellee, *United States v. Torres*, No. 15-10492 (9th Cir. July 15, 2016), 2016 WL 3878372, at *22 ("unauthorized aliens do not have a Second Amendment right to bear arms"); Brief and Short Appendix of Plaintiff-Appellee, *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016) (No. 14-3271), 2015 WL 2064443, at*13-*15 ("[T]he government asserts that the term 'the people' within the Second Amendment properly excludes illegal aliens."); Brief for the United States, *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (No. 11-10086), 2011 WL 2115676, at *7 ("illegal immigrants do not possess Second Amendment rights"); Brief of Plaintiff/Appellee, *United States v. Rangel-Hernandez*, 597 F. App'x 553 (10th Cir. 2015) (No. 14-7056), 2015 WL 222869, at *8-*17 (arguing that an unlawfully-present alien has no Second Amendment rights).
- *Fourth Amendment. E.g.*, Appellee's Brief, *Castro v. Cabrera*, 742 F.3d 595 (5th Cir. 2014) (No. 13-40017), 2013 WL 8635071, at *25 ("Plaintiffs who were seeking admission as aliens were not entitled to constitutional protections, because they

had not yet 'come within the territory of the United States.'").

- *Sixth Amendment. E.g.*, Reply Brief for Appellant United States at 9, *United States v. Ospino*, 317 F. App'x 684 (9th Cir. 2009) (No. 08-50461), 2008 WL 6822006 (defendant's rights "should have turned on objective factors and practical concerns, such as his citizenship, lack of substantial ties to the United States .... In [defendant]'s case, that right must be considered diminished, relative to the speedy trial right of others with more substantial ties to the United States, living within the sovereign or diplomatic reach of the United States.").

These authorities confirm that the analyses set out in *Verdugo-Urquidez* and *Eisentrager* not only are axiomatic, but that they are routinely applied in the exact situation this case presents. The court of appeals' failure to even recognize, let alone apply, the proper legal framework confirms that its decision should be vacated. *See Munsingwear*, 340 U.S. at 40-41.

III. If Left in Place, the Decision Below Will Exacerbate Unlawful Immigration and Further Strain the States' Limited Resources.

As this Court has recognized, the States already "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. In short, "[t]he States lose badly needed tax dollars each year due to the presence of illegal aliens—a clear drain upon their already-taxed resources." *Texas v. United States*, 86 F. Supp. 3d 591, 631 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *as*

revised (Nov. 25, 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). If allowed to stand, the court of appeals' decision will only exacerbate those losses by inviting everyone who reaches this country unlawfully—no matter how briefly—to demand the full scope of constitutional rights.

The State of Texas, in particular, already expends substantial resources trying to deal with unlawful immigration. Two decades ago, the Fifth Circuit recognized that Texas' "educational, medical, and criminal justice expenditures on undocumented aliens" were over a billion dollars annually. *Texas v. United States*, 106 F.3d 661, 664 (5th Cir. 1997). And "in 2008, Texas incurred $716,800,000 in uncompensated medical care provided to illegal aliens." *Texas*, 86 F. Supp. 3d at 630.

The State of Texas continues to incur these staggering costs caused by unlawful immigration. For example, during the 2013 fiscal year (the most recent year for which such data has been compiled) the State of Texas alone spent approximately $90 million on emergency Medicaid services for unlawfully-present aliens. *See* Texas Health and Human Services Commission, *Report on Texas Health and Human Services Commission Services and Benefits Provided to Undocumented Immigrants* (Dec. 2014), https://hhs.texas.gov/reports/2015/02/report-health-and-human-services-commission-services-and-benefits-provided-undocumented-immigrants. That was almost a $20 million increase over the $71 million spent on such services in 2011, and almost a 50% increase over the $62 million spent on such services in 2009. *Id.* The State of Texas further spent approximately $38 million during the 2013 fiscal year

providing coverage for perinatal care. That was millions more than it spent in 2011 ($35 million) and 2009 ($33 million). *Id.*

When more benefits are given to unlawfully-present aliens, it will incentivize even more aliens to enter the country unlawfully and "will increase the number of individuals that demand them." *Texas*, 86 F. Supp. 3d at 634. The State's Health and Human Services Commission has thus correctly projected the estimated sums will continue to rise as the number of unlawfully-present aliens increases within the State's borders. *See* Plaintiff's Reply in Support of Motion for Preliminary Injunction at 53, *Texas v. U.S.*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-00254). Plus, unlawfully-present aliens are less likely to have health insurance and are more likely to rely on emergency rooms or public clinics for health care. Congressional Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* (Dec. 2007), at 8, https://www.cbo.gov/publication/41645.

The rapid increase in unaccompanied minors such as the alien here accounts for much of those cost trends. From 2011 to 2014, the number of unaccompanied minors apprehended at the border more than *quadrupled*—from 17,109 in 2011 to 73,741 in 2014. U.S. Government Accountability Office, *Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care, GAO-16-180* (Feb. 2016), at 4, https://www.gao.gov/products/GAO-16-180. Of those 73,741, nearly 57,500 were turned over to the care of the Office of Refugee Resettlement. *Id.* at 1. This rapid increase "has at times strained

ORR's capacity to find shelter beds," *id.* at 2, and "created challenges for the communities in which these children are eventually placed." *Id.* Furthermore, the increase in facilities combined with insufficient resources have prevented ORR from performing required on-site monitoring of facilities, in some cases for several years. *Id.* at 26-27.

Large influxes of unaccompanied minors also strain States' education resources. The State of Texas bears the cost of about $9,473 per child for the public education of unlawfully-present alien children. *Texas*, 86 F. Supp. 3d at 630. From October 2013 to September 2014, "Texas absorbed additional education costs of at least $58,531,100 stemming from illegal immigration." *Id.*

The costs are not just financial. This Court in *Arizona* recognized the "disproportionate share of serious crime" committed by unlawfully-present aliens in Arizona's most populous county. 567 U.S. at 398. Indeed, "there is an 'epidemic of crime, safety risks, serious property damage, and environmental problems' associated with the influx of illegal migration across private land near the Mexican border." *Id.* (citation omitted).

States like amici "cannot protect themselves from the costs inflicted" by a massive uptick in the number of individuals able "to compel state action." *Texas*, 86 F. Supp. 3d at 620. That is why the States have consistently fought against any effort to "explicitly or impli[citly] solicit immigrants to enter the United States illegally." *Id.* at 630.

Yet the decision below does exactly that. The court of appeals' decision effectively announces that anyone on Earth has any number of constitutional rights simply by

being apprehended while trying to cross the United States border unlawfully. This holding will make the unlawful immigration crisis worse and further strain the budgets and resources of governments throughout the Nation.

* * *

The federal government has suggested that respondent counsel's efforts to thwart this Court's review may warrant disciplinary action. Pet. 26-28. The propriety of such action could turn on representations in documents amici cannot review. *See, e.g.*, Pet. 12-13. Because amici do not have access to these materials, amici are unable to take a definitive position on this issue. But it is abundantly clear that the federal government intended to seek this Court's review in an expeditious matter within 24 hours of the court of appeals' en banc decision. *See* Pet. 9, 11. At a minimum, these extraordinary circumstances further warrant vacatur.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand to the district court for dismissal of all claims for prospective relief regarding pregnant unaccompanied minors.

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